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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3 ROBERT A. FALISE; LOUIS)
4 KLEIN, JR.; FRANK)MACCHIAROIA; and)
5 CHRISTIAN E. MARKEY, JR.,)As Trustee,)
6) Plaintiffs,)
7) vs.)
8)THE AMERICAN TOBACCO)
9 COMPANY; RJ REYNOLDS TOBACCO)COMPANY; B.A.T. INDUSTRIES,)
10 PLC; BROWN & WILLIAMSON)TOBACCO CORPORATION; PHILIP)
11 MORRIS INCORPORATED; LIGGETT)GROUP, INC.; and LORILLARD)
12 TOBACCO COMPANY,)
13 Defendants.)-----)

14
15 CONTINUED VIDEOTAPED
16 DEPOSITION OF PROFESSOR KAREN GROSS
17 New York, New York
18 Friday, June 9, 2000
19
20
21

22 Reported by:
23 ROBERT X. SHAW, CSRCSR NO. 817
24 JOB NO. 109504

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3
4 June 9, 2000
5 10:15 a.m.
6

7 Continued Videotaped Deposition of
8 PROFESSOR KAREN GROSS, held at the offices
9 of Orrick Herrington Sutcliffe, LLP, 666 Fifth
10 Avenue, New York, New York, pursuant to
11 Adjournment, before Robert X. Shaw, CSR, a
12 Notary Public of the State of New York.
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1 A P P E A R A N C E S:
2
3 ORRICK HERRINGTON & SUTCLIFFE, LLP
4 Attorneys for Plaintiffs
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6 New York, New York 10103
7 BY: STEVEN J. FINK, ESQ.
8
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10 KIRKLAND & ELLIS

11 Attorneys for Brown & Williamson
12 200 E. Randolph Street
13 Chicago, Illinois 60601
14 BY: JAMES C. MUNSON, ESQ.
15 -and-
16 KIRKLAND & ELLIS
17 153 East 53rd Street
18 New York, New York 10022
19 BY: EZRA J. REINSTEIN, ESQ.
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22
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24

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1 A P P E A R A N C E S (Cont'd)
2
3 WOMBLE CARLYLE SANDRIDGE & RICE
4 Attorneys for RJ Reynolds Tobacco
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7 Winston-Salem, North Carolina 27102
8 BY: BONNIE KAY DONAHUE, ESQ.
9

10
11 ALSO PRESENT:
12 Silvio Facchin, CLVS
13 Esquire Video Services
14
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1 THE VIDEOGRAPHER: I will ask you to stand
2 by, please.
3 This is the tape labeled number 5 of the
4 videotaped deposition of Karen Gross. We are now
5 going on the record, the time is 10:15 a.m.
6 Q. Good morning, Professor Gross.
7 A. Good morning.
8 MR. FINK: I will ask the court reporter to
9 mark as Exhibit 5 a letter that I received from
10 counsel.
11 (Gross Exhibit 5, June 8, 2000 letter from
12 Ezra Reinstein, marked for identification as of
13 this date.)
14 K A R E N G R O S S, called as a
15 witness, having been previously duly sworn by the
16 Notary Public, was examined and testified as
17 follows:.
18 CONT'D EXAMINATION
19 BY MR. FINK:
20 Q. Professor Gross, do you have before you what
21 has been marked as Exhibit 5?

22 A. Yes.
23 Q. It is a letter from Mr. Reinstein of Kirkland
24 & Ellis dated June 8th. This letter reflects that
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1 there are three items that you had reviewed and relied
2 on, but which are not reflected in your list of
3 reliance materials in this case here.
4 I will ask you to look at the letter and if
5 you can confirm for me that those are indeed items that
6 you have reviewed and relied on?

7 A. Sure. Just give me a second to read it.

8 Q. Thank you.

9 A. Yes, I have read it.

10 Q. Are the descriptions, I will ask you this,
11 are the statements in the letter accurate to the best
12 of your understanding?

13 A. Yes. Absolutely.

14 Q. Are there any materials other than those
15 listed in the letter that you have reviewed and relied
16 on in connection with the preparation of your reports
17 in this case other than those listed on the reliance
18 list in your report, your report and supplemental
19 report?

20 A. Other than what's in this letter and in the
21 reports, there is nothing else.

22 Q. Thank you. Professor Gross, I will ask you
23 at this time to turn your attention to what was marked
24 at the first day of the deposition, which is Exhibit 2,
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1 which is the supplemental report. Specifically,
2 Professor Gross, if you could focus on what's entitled
3 as basis two on page 5 of the report.

4 Are you with me there?

5 A. Yes, I am.

6 Q. The first sentence under basis two on page 5
7 says given the magnitude of the trust's financial
8 distress, a number of options were available to the
9 trust for consideration post-consummation.

10 My question to you is -- and then you go on
11 to talk about these options -- what is the specific
12 time frame that you were contemplating when you
13 discussed the options available to the trust?

14 A. If you don't mind --

15 Q. Feel free to review any portion of your
16 report that will put this in context or otherwise help
17 you to answer the question.

18 MR. MUNSON: Would you repeat the question,
19 please. Read it back, please Mr. Reporter.

20 (Record read.)

21 MR. MUNSON: Thank you.

22 A. This sentence is referring to the options
23 that the trust considered following consummation of the
24 plan of reorganization, which was in November of 1988.

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1 And it is the options that were considered
2 available to them for consideration in that period
3 subsequent to confirmation.

4 Q. All right. And in your report you referred
5 to these as being considerations post-consummation; is
6 that right?

7 A. Yes. My first report addresses a combination
8 of issues and this report principally focuses on the
9 period from consummation going forward to plan
10 implementation and then forward after that.

11 Q. When was the consummation date?

12 A. The plan was consummated in November of
13 1988.

14 Q. So, taking that as a starting point, November
15 of 1988, was there an ending point to the time during
16 which these various options were available to the trust
17 in your view?

18 A. Let me make several observations in regard to
19 that question. The first is that the consideration of
20 options post-consummation has to be taken in context
21 and I want to describe several of those contexts.

22 One was that there was litigation pending and
23 there were various efforts to deal with the trust
24 problems that were before a court.

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1 And even after an initial decision
2 while things were being appealed there was further
3 opportunity to consider various options in the context
4 of that litigation.

5 In addition to that, the trust had its own on
6 going effort to continue to do that which it did and in
7 the course of that had the opportunity to consider how
8 to deal with its situation, and third, all of this
9 occurs in the context of the trust growing out of the
10 plan and having to make choices and think about choices
11 in light of the plan, and in light of what the trust
12 was supposed to do subsequent to consummation.

13 Q. With that background, Professor, my question
14 to you I think is a more simple one. Given November of
15 1988 as the beginning point, can you give me an ending
16 point, book marks if you will, for the time period
17 during which these considerations that you have
18 outlined here were relevant?

19 A. Well, I have described to you three contexts
20 really in which the trust had to think, among others I
21 am sure.

22 The first as to the litigation. The
23 litigation ultimately resulted in a TDP, which became
24 operative. And when that became true the trust then

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1 still had to continue to operate, it is just, and had
2 to think about what to do and how to proceed, but
3 certain things had been resolved under that TDP.

4 Second, in terms of just its on going
5 operations, those are not time limited in the same way;
6 and third, in terms of its obligations to act in
7 accordance with how it was constructed and supposed to
8 operate based on bankruptcy code provisions, remains an
9 on going obligation.

10 So the time length to consider options
11 depends on which of those three particular things one
12 is focusing on.

13 Q. Professor, you go on, do you not, on pages
14 five and six to enumerate in a number of bullet point
15 entries various options that you say were available to
16 the trust post-consummation.

17 A. Yes, I do.

18 Q. And am I understanding your testimony
19 correctly to be that all those options remain relevant
20 today?

21 A. If it is acceptable, let me just look through
22 the list.

23 Q. Please feel free in answering any of my
24 questions to look at anything that has been put before
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1 you as necessary to help you answer.

2 A. I would say these options had their primary
3 focus on resolving the trust's acute financial dilemmas
4 and its acute structural and operational deficits.

5 There are aspects of these options, however,
6 which on a go-forward basis may be ones that the trust
7 would again have to think about, for example, altering
8 the timing of payments is something that it has had to
9 consider subsequent to 1995 because it is not clear
10 that even post TDP it is not clear that the trust will
11 be able to resolve its fundamental and deep flaws.

12 And in that sense although the TDP
13 contemplated that claimants would receive 10 percent,
14 only 10 percent of their claim, it is not clear going
15 into perpetuity that even that will be able to be
16 fulfilled.

17 Q. Can I ask you, Professor, what's the basis
18 for the statement, what's your basis for the statement
19 that you just made that on a going forward basis the
20 trust may not be able to meet its 10 percent pay out
21 obligation?

22 A. Um, in reaching my conclusions and opinions
23 in this I have relied on a variety of documents from
24 the trust itself that the trust either had written to
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1 outsiders or internally, and it is in that context that
2 I saw references to concern about the trust, the
3 trust's ability or potential inability to continue to
4 function on a go-forward basis.

5 Q. So it is not that you, you did not perform
6 any independent economic evaluation of the trust; did
7 you?

8 A. Um --

9 Q. Let me phrase that differently.
10 You did not perform any independent
11 evaluation of the trust's financial condition to
12 determine whether it would be able to satisfy its 10
13 percent payment obligation; did you?

14 A. As a law professor my expertise is in
15 thinking about analyzing and assessing a situation in
16 light of the facts.

17 My role here was primarily based on looking
18 at documents of a wide sort including those which the
19 trust itself generated. But I have not done an
20 independent economic analysis of the trust.

21 I have relied on the trust's own assessment
22 and documents that reflect the assessment of others as
23 to the trust's health or lack thereof.

24 Q. Let's take a look now at these options that
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1 you bullet pointed on pages five and six. And we are
2 now talking about the post-consummation period; can you

3 agree on that?

4 A. Sorry.

5 Q. Can we just agree that we are now talking
6 about the post-consummation period?

7 A. What I tell you is that these are the
8 options that were considered post-consummation, some of
9 them could have and may well have been considered
10 pre-consummation.

11 But they were certainly ones that were
12 available for consideration, which is the words that
13 I use, they were options that were available for
14 consideration post-consummation.

15 Q. Okay. And the first factor that you
16 identified here as having been available for
17 consideration post-consummation was revising the
18 structure of the trust itself, and you go on to say,
19 this could include curtailing plaintiff access to the
20 judicial system, changing the FIFO payout approach,
21 precluding impleader actions and instituting a claims
22 matrix; right?

23 A. Yes. That's what the first bullet provides.

24 Q. Right. Was this eventually done?

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1 A. There are a number of things that the trust
2 did which included aspects of these, but I think it is
3 important to recognize that they did not do these in a
4 vacuum and they did not come upon their changes on
5 their own.

6 Indeed other parties influenced those
7 changes. So, some of them came out in somewhat
8 different ways than might have happened in other
9 situations. But there are aspects of these that were
10 accomplished, that's true.

11 Q. Was plaintiff access to the judicial system
12 ultimately curtailed?

13 A. Yes. One of the features of the TDP was to
14 curtail personal injury claimants access to the tort
15 system.

16 Q. Were impleader actions ultimately precluded?

17 A. Yes. Impleader actions which, yes were
18 ultimately precluded.

19 Q. Was a claims matrix instituted under the TDP?

20 A. Yes. A very carefully negotiated hotly
21 negotiated claims matrix was ultimately instituted.

22 Q. Let's look at your second bullet point, the
23 second option that was available for consideration by
24 the trust post-consummation.

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1 As you have it here, it says altering the
2 timing amount and/or nature of the claims to be paid.
3 By way of example: The time to make payments could be
4 extended into the future with, all or a portion of the
5 payment being made well into the 21st Century; the
6 percentage of the claim to be paid whensoever payment
7 occurred could be reduced from 100 percent (the amount
8 paid to pre-C claimants) to some other more manageable
9 figure; and deferred payments could contain an interest
10 component to compensate for the time value of money.

11 Did I read that correctly?

12 A. Yes, you did.

13 Q. Was this done?

14 A. Aspects of this particular bullet point were
15 done.

16 Q. Specifically the percentage of the claim
17 to be paid was reduced from 100 percent to a smaller
18 number, which is currently 10 percent; isn't that
19 right?

20 A. What's accurate is that different things
21 happened at different points in time. There was a time
22 period post-consummation where the amounts, some
23 amounts were reduced, some amounts were not reduced and
24 some amounts were reduced at varying amounts.

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1 So, I don't think there is one answer that
2 the percentage of claims to be paid went from 100 to
3 what you just said was 10 percent; that did not happen
4 like that. Different claimants had gotten different
5 percentages in different contexts post-consummation.

6 But, altering 100 percent pay out in some
7 fashion for some claimants did occur.

8 Q. Professor Gross, you say here that pre-C
9 claimants received 100 percent; is that right?

10 A. Yes. This indicates that pre-C claimants had
11 been paid 100 percent.

12 Q. That is accurate, isn't it, your statement?

13 A. To the best of my knowledge pre-C claimants
14 were to be awarded 100 percent of the amount of their
15 allowed claim.

16 The trust was only supposed to pay the
17 asbestos share of liability and pursuant to bankruptcy
18 code provisions the trust can only pay if the claim is
19 allowed. And the pre-C claimants received 100, were to
20 receive full payment 100 percent of their allowed
21 claim.

22 In reading the documents that I have read, it
23 appears that the pre-C claimants did get 100 percent,
24 although I have never done an actual assessment of

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1 whether each and every claimant him or herself actually
2 got in his or her hands the 100 percent. That's what
3 they were allowed, that's what the documents indicate
4 they should have been paid.

5 I can't vouch for whether in fact each of
6 these people has that in their hands, but there is
7 every reason to believe that these pre-C claimants were
8 to be paid and were paid 100 percent.

9 Q. And today trust beneficiaries receive 10
10 percent of the scheduled values of their claims under
11 the TDP; isn't that right?

12 A. I am sorry, could you --

13 Q. Today trust beneficiaries receive 10 percent
14 of the scheduled value of their claims under the TDP;
15 isn't that right?

16 A. Today, as I understand it, claimants whose
17 claims are treated under the TDP are entitled to 10
18 percent of the amount of their allowed claim, which is
19 10 percent of the amount of liability that the trust
20 has to pay these people.

21 So it is only, they are only getting 10
22 percent of the 100 percent that they are owed from the
23 trust for the asbestos injuries that they suffered.

24 But, I want to be very clear here, there are

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1 a group of claimants who did not get 10 percent who
2 got more than 10 percent in a gap period between
3 consummation and the implementation of the TDP.

4 So that the 10 percent is not everybody
5 post-consummation, it is only one group of claimants
6 post TDP.

7 MR. FINK: I will move to strike the latter
8 portion of the answer as nonresponsive.

9 Q. Professor, these options that you are saying
10 were available, that were available for consideration
11 to the trust, is it your suggestion that these are
12 options that should in fact have been considered during
13 the post-consummation time frame to alleviate the
14 trust's problems?

15 MR. MUNSON: Objection to the question, it is
16 multiply compound.

17 Q. Professor, we are currently focusing on some
18 options that you have indicated were available for
19 consideration during the post-consummation period; is
20 that right?

21 A. Yes.

22 Q. Is it your view that these options should
23 have been considered by the trust during that time
24 period, the post-consummation time period?

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1 A. I think what I can say is that these are
2 options that were available, some of which would have
3 worked better and some of which may not have worked as
4 well as others.

5 And what the trust had to do, I think, was
6 make an assessment as to available options and then
7 pursue those options that that trust thought would be
8 most beneficial for the goals that it was trying to
9 achieve.

10 And that means that some options are, would
11 have been I would believe more suitable or less
12 suitable to their situation than others, and part of
13 their job as fiduciaries is to weigh and assess among
14 the options which ones would be best for it in light of
15 its situation at the time it was making those choices,
16 with all the other parties who had to impact on those
17 choices. That's what I think they had to do.

18 Q. In your view was reducing the percentage
19 to be paid to claimants an appropriate step for the
20 trust to take to address its financial situation
21 post-consummation?

22 A. I am sorry. I just would like to hear the
23 exact words that you used.

24 MR. FINK: Sure. Why don't you read it back,

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1 please.

2 (Record read.)

3 A. When I think about these things I can't
4 think about one option separated from others or
5 a-contextually. I think what I would say to you is
6 in light of the trust's history, paying a reduced
7 percentage may have been inevitable, but I am not sure
8 that I would say to you just a-contextually that just
9 reducing the number was the right or only choice.

10 Q. Professor, that is not my question and I
11 would like you to focus on the question that I am
12 asking, which is whether in your view reducing the
13 payment percentage was an appropriate step for the
14 trust to take, I am not saying the only one, I am
15 asking whether you think it was an appropriate step for
16 the trust today post-consummation.

17 A-N appropriate.

18 A. I thought one appropriate --

19 Q. Or if you want, the way I phrased it
20 was, A-N.

21 A. In light of its financial situation, in light
22 of the pressures with which it had to deal in terms of
23 the plaintiffs' lawyers, in light of its history, in
24 light of its need to resolve things speedily and in a
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1 cost efficient way, and in light of the fact that it
2 could not cure its earlier deficits, and recognizing
3 that what it did would not fix the past, I think it
4 was, I think a reduced payment was one of the available
5 options to the trust.

6 So --

7 Q. Professor, again, I don't think you are --
8 MR. MUNSON: Objection, counsel. I am sorry
9 to interrupt you, but the witness plainly had not
10 finished answering.

11 Q. I am sorry. I thought she had. Please
12 finish, I honestly thought that she had.

13 A. I thought your question then at the end asked
14 me, so was it one of the options that would have been
15 available.

16 Q. Well, why don't you finish your answer to the
17 previous question and then I will ask my next one.
18 Were you done, Professor, with your answer?

19 A. I was not done with my last one, but now I
20 have sort of, I was going to give you the very tail end
21 answer to your --

22 Q. Please do.

23 A. -- to your question, for which I wanted to
24 set the stage and give certain --

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1 MR. MUNSON: Professor, why don't you go
2 ahead. If you hadn't finished, why don't you go
3 ahead and finish.

4 A. Just read me the question again and I will
5 give you the last part of the answer, which will
6 incorporate the earlier part.

7 Q. Unless counsel objects, let me just do it
8 this way. Professor, my question was not whether it
9 was an available option, the question that I am asking
10 you is whether in your view in light of the overall
11 context of the trust, a reduction in the payment amount
12 to trust claimants was an appropriate step for the
13 trust to take, post-consummation.

14 A. With all of the things from my prior answer
15 and what I was going to answer at the very end before
16 is yes, in light of everything that I said before,
17 recognizing what it could and couldn't do by doing
18 that, reducing the payment was an appropriate step in
19 light of the context, the people, the history and the
20 dynamics.

21 Q. Professor, returning to your bullet points,
22 the third bullet point, and again we are talking about
23 options that were in your view available to the trust
24 for consideration post-consummation, the next option is

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1 obtaining judicial intervention.

2 And you go on to say, this could include
3 returning to the bankruptcy court, which it handled the
4 Johns-Manville Chapter 11 case and entered the order
5 confirming the plan of reorganization.

6 Another option you say could be developing a
7 class action and then seeking its approval before a
8 judge. Have I read that correctly?

9 A. Yes, that's what the third bullet says.

10 Q. All right. In fact, the trust's options were
11 ultimately restructured through a class action
12 settlement; were they not?

13 A. Ultimately, what happened was that the last
14 sentence there, another option could be developing a
15 class action and then seeking its approval before a
16 judge, it is that last sentence which was the approach
17 that was taken.

18 Q. And that was a form of obtaining judicial
19 intervention, was it not, or a way of obtaining
20 judicial intervention?

21 A. Yes. That is, the general category is
22 judicial intervention. And one way of obtaining
23 judicial intervention in this case was through the
24 class action vehicle.

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1 Q. And the class action vehicle was the
2 mechanism that was in, which was in fact used here for
3 obtaining judicial intervention; correct?

4 A. Yes, it ultimately was the vehicle.

5 Q. Let's turn to your next bullet point, the
6 next option in your view available to the trust for
7 consideration post-consummation.

8 You describe that option as pursuing other
9 assets or improving existing asset management.

10 And then you say by way of example, there
11 could be an early sale of some or a controlling
12 interest in the Johns-Manville stock held by the trust
13 and an additional voluntary contribution from
14 Johns-Manville, increased trust involvement in the
15 operation of Johns-Manville, and maximizing or
16 obtaining prepayment of assets obtained from
17 Johns-Manville. Did I read that correctly?

18 A. Yes. You did.

19 Q. Did the trust post-consummation pursue other
20 assets or improve existing asset management?

21 A. I would say it, did it in some ways and not
22 in others?

23 Q. The trust in fact considered a number of
24 different transactions in order to improve its existing

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1 assets and to improve its management of those assets;
2 did it not?

3 A. The lead in to your question? Sorry.

4 Q. Isn't it a fact that post-consummation
5 the trust considered a number of different forms of

6 transactions to improve its asset management and to
7 enhance its asset base?

8 A. My reading of the trust internal documents
9 indeed suggests that they considered ways of improving
10 how assets were handled; yes.

11 Q. And they ultimately implemented some of those
12 alternatives; did they not?

13 A. There were a number of options available to
14 the trust. They picked and chose certain things to do
15 which necessarily meant they did not do other things.

16 But they chose to do certain things related
17 to improving existing asset management, yes, they did
18 that.

19 Q. You would agree with me would you not that
20 the trustees as fiduciaries are indeed required to
21 choose among different, many, many different options
22 that are available to them with regard to significant
23 matters such as managing the trust's assets?

24 A. The trustees of this trust were fiduciaries

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1 and they were obligated to try to deal with and improve
2 existing asset management. Whether they considered all
3 of the options, I can't speak to that.

4 Their documents indicate that they thought
5 about certain ways of improving the trust, and they
6 picked and chose among what they took to be the
7 options, recognizing that in picking some and not
8 picking others certain benefits and burdens came from
9 those choices.

10 That's their job to do that, whether they
11 made the best and the right choices is a different
12 issue.

13 Q. Okay, Professor.

14 I think me question is a different one.

15 The question is, whether you would agree
16 with me that the trustees as fiduciaries were indeed
17 obligated to select among the various choices available
18 to them for improving the management of the trust's
19 assets?

20 A. I think what I would say to you is as
21 trustees their job was to develop the pan', the group
22 of options and then evaluate them and as fiduciaries to
23 pick and choose among them.

24 But these trustees were being simultaneously

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1 influenced by another group of people that impacted on
2 their decision making.

3 And that is very important to keep in mind
4 here because the way this trust was structured, these
5 trustees were not acting in isolation. This trust was
6 connected to a plan which gave another group of people,
7 namely the plaintiffs' lawyers, influence and impact on
8 that trust and that decision making in many respects.
9 And so, they couldn't just go off as fiduciaries on
10 their own in a vacuum.

11 They had these other influences that impacted
12 on what they did.

13 And so, in answering your question, I have
14 to say that they had to act as fiduciaries, but they
15 weren't acting alone.

16 MR. FINK: I will move to strike everything

17 after the word but, which came about two or three
18 sentences into your answer, as nonresponsive.

19 Q. Professor, I will just state for the
20 record that your counsel and I have discussed, you
21 know, time limitations that they want to impose on this
22 deposition, pursuant to practice in this case, and I
23 think it would be helpful if you could try to limit
24 your answers to the questions that I have asked, and

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1 you are going to have an opportunity to testify perhaps
2 at trial, your counsel will ask you questions and you
3 will have an opportunity to say everything you want
4 to say.

5 But, I don't think your embellishments --
6 well they are certainly not going to speed this process
7 up.

8 Focusing on the next bullet point, which
9 is in your view as you have laid them out here, the
10 next option that was available to the trust for
11 consideration post-consummation, you describe it as
12 improving the internal management of the trust, this
13 could include replacement of trust management. Have I
14 read that correctly?

15 A. Yes, you have.

16 Q. Was that done?

17 A. There was a change in trust, in certain of
18 the people managing the trust and there also was a
19 change in who was serving as trustees. That did happen
20 factually, that those changes were made. But the trust
21 did not make them all on its own.

22 Q. Professor, your next and final bullet point
23 outlining the options available to the trust for
24 consideration post-consummation talks about seeking a

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1 bankruptcy for the trust itself; is that right? There
2 is more language there, but that is the topic?

3 A. Yes. There is more language there, but one
4 of the things that I indicate is a bankruptcy of the
5 trust's itself.

6 Q. And to be complete, and accurate, I should
7 point that you say, or a receivership.

8 A. Or actually an involuntary bankruptcy, which
9 is an important difference because one is the trust
10 choosing to go into bankruptcy, and the other is people
11 forcing it into bankruptcy.

12 Q. Fair enough. Later in this paragraph you
13 have a parenthetical which says assuming eligibility;
14 do you see that?

15 A. Yes.

16 Q. Do you know, Professor, whether or not the
17 trust is eligible for bankruptcy?

18 A. I have read various documents in which
19 lawyers to the trust and I believe other lawyers
20 offered their respective views. I have not been asked
21 to issue any legal opinion on whether I think the trust
22 is or was eligible for either a voluntary or an
23 involuntary bankruptcy.

24 Q. Professor, you are holding yourself out in

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1 this case, are you not, as an expert in bankruptcy law?

2 A. Yes, I am.
3 Q. Okay. Professor, as an expert in bankruptcy
4 law can you answer the question whether or not the
5 trust is eligible for bankruptcy?
6 A. I certainly know the requirements for
7 eligibility and I am very familiar with the issues that
8 were raised in the various opinions by very well known
9 law firms, in which they debated the topic about
10 whether the trust was or was not eligible for either a
11 voluntary or involuntary bankruptcy.
12 And unless I were to sit down and carefully
13 assess that specific question -- I would not even as an
14 expert, and by the way someone who writes about
15 involuntary bankruptcies for the leading bankruptcy
16 treatise, I wouldn't right now give you my opinion on
17 that.
18 That is a very difficult issue as those
19 lawyers themselves pointed out and I can certainly
20 raise the arguments for you and explain where the legal
21 difficulties rest. But right now, I don't think it is
22 appropriate for me to give you my opinion on that
23 issue.

24 Q. Is it fair to say, Professor, that as we

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1 sit here today, you do not currently have an opinion
2 on whether or not, whether or not the trust is eligible
3 for bankruptcy or was eligible for bankruptcy
4 post-consummation?

5 A. Actually, I don't think that is fair to say.

6 I think what's fair to say is that I have
7 thought about it, I understand very well the issues
8 that are raised, I have read the opinions of the law
9 firms that debated this for the trust.

10 But I have not, and by the way, I understand
11 the difficulty that confronted the trust in trying to
12 assess whether that was or was not the right option.

13 I have done all that. But what I have not
14 done is I have not rendered my opinion on that question
15 and I have not done that, not only because I was not
16 asked to do that but because to do that would require
17 that I look at very, very detailed facts, at very
18 detailed facts, myself, not relying on other lawyers,
19 very detailed facts myself that would help me decide
20 this very hard question.

21 And that particular part, the development and
22 looking at very specific facts that would help me make
23 that, I have not done that.

24 Q. So, Professor, with all that background

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1 isn't it fair to say that as you sit here today without
2 having done, well --

3 Strike that.

4 Professor, isn't it fair to say that as you
5 sit here today you have not formed an opinion whether
6 or not the trust is eligible for bankruptcy?

7 MR. MUNSON: Objection. Asked and answered,
8 counsel; three times.

9 MR. FINK: I would like to hear the answer.

10 MR. MUNSON: If you have anything different
11 to say, Professor, if you have something
12 different. You have been asked the question

13 several times. If you have something different to
14 say, say it. If you don't, just say you don't
15 have anything different to say so that we can
16 move on.

17 A. Um, I would repeat what I just said about
18 what I have done, what I have thought about and what I
19 am able to say.

20 Q. Professor, I am going to ask you now to turn
21 to page 7. The heading there is basis three. We are
22 looking at your supplemental report.

23 Are you with me, Professor, on page 7?

24 A. Yes, I am.

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1 Q. If you look with me, and why don't we start
2 with the first sentence, when the final TDP was reached
3 in 1994, and became operative in early 1995, the trust
4 was far from being solely responsible for its
5 contours.

6 And then you go on to say, rather the
7 ultimate choices reflected an effort to address the
8 powerful influences of the plaintiffs' lawyers and then
9 you go on to identify some other constituencies.

10 My question to you is when you refer there to
11 the ultimate choices, what are you referring to?

12 A. Again, just give me a second to place basis
13 three in the context of the whole opinion.

14 Q. Absolutely.

15 A. This is referring to the choices that got
16 made and were reflected in the TDP, for purposes of
17 resolving the issues that were in the class action.

18 Q. Professor, you agree with the statement do
19 you not that the TDP over came certain of the trust's
20 original structural defects?

21 A. Yes. I would agree that there were certainly
22 things it could not do, but there were ways in which
23 the trust did overcome certain of the original defects;
24 yes.

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1 Q. Professor, on the bottom of page 7, looking
2 at the last paragraph and actually the carry over
3 sentence that starts at the bottom of page 7, you say,
4 as such the resolution in the TDP created some new
5 although not unanticipated consequences including, and
6 then you go on to enumerate three consequences; is that
7 correct?

8 A. Yes. That's what it says.

9 Q. Okay. And the first of these consequences
10 you say is, and there is a bullet point, start up costs
11 to enable TDP implementation and then you say
12 parenthesis, which meant revamping how claims had been
13 settled and paid previously, and then the parenthesis
14 end; is that right?

15 A. Yes. That's what it says.

16 Q. Have you ever made any effort to quantify
17 what the TDP start up costs were?

18 A. In making my statement here in this report,
19 what I did is I looked at a variety of documents that
20 the trust itself had generated. So, I am aware that
21 there were costs, it was not my particular task to
22 quantify those costs.

23 Q. Am I correct in understanding that you did

24 not quantify the TDP start up costs?

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1 A. It is correct that other than assessing
2 their, other than determining their existence, I have
3 not quantified the exact dollar amount of them, that is
4 correct.

5 Q. Is it your opinion that the TDP start up
6 costs whatever their amount have some effect on the
7 amount that the trust is entitled to recover, if any,
8 from the tobacco industry in this case?

9 A. I am sorry. Could you repeat the question.

10 Q. Let me phrase it differently.

11 In the event that the trust were to obtain a
12 recovery from the tobacco industry in this case, is it
13 your view that the TDP start up costs have any
14 relevance to the amount of that recovery?

15 A. Let me start by saying that I don't assume
16 that the tobacco companies owe anything to the trust.

17 But one of the things that would have to be
18 taken into account in assessing how the trust got to
19 where it is and why it is in the jam that it is in is
20 that you have to look at every piece of how it got to
21 be where it is, because that accounts for why it
22 doesn't have the money now to pay its claimants more
23 than 10 percent.

24 And there are a lot of things you would look

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1 at to make that assessment. Um, and one of them would
2 be the start up costs.

3 Q. Professor, again, I am not sure you have
4 answered my question, which is: Whether in your view
5 in the event that the trust obtains a recovery from the
6 tobacco industry these TDP start up costs would be
7 relevant to the amount of that recovery?

8 MR. MUNSON: Objection. Asked and answered.

9 MR. FINK: No. I did not understand it to be
10 answered, but --

11 If your answer is yes, I guess that would
12 help.

13 MR. MUNSON: I object to your argument with
14 the witness. Professor, if you have already
15 answered the question, fine. If you have
16 something further to say, that's fine, but --

17 You don't have to answer it again.

18 A. There is nothing I would change in my prior
19 answer. I stand on the answer that I gave before.

20 Q. Is that answer a yes?

21 MR. MUNSON: Objection. You are arguing with
22 the witness.

23 MR. FINK: I am trying to understand the
24 testimony, counsel.

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1 A. Is it possible to read back my answer?

2 Q. No. I would just like to know whether or not
3 the answer is a yes? I suppose if you need to hear it
4 to do that, you are entitled to hear it if you would
5 like.

6 MR. MUNSON: I object to your arguing with
7 the witness, and I object that the question has
8 been asked and answered.

9 Professor, if you have something to add to
10 your answer, you are free to, but if you have
11 already answered the question to the best of your
12 ability, you are free to say that.

13 A. I have nothing further to add in respect of
14 this question.

15 Q. Professor, your next bullet point here for a
16 new although not -- new although not unanticipated
17 consequence of the TDP, is uniformity of recovery by
18 categories of claimants meeting certain criteria; is
19 that right?

20 A. Yes. That is correct.

21 Q. Is this uniformity of recovery in your view a
22 good thing or a bad thing?

23 MR. MUNSON: I will object to the question,
24 the grounds that it is ambiguous; good or bad, to

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1 whom or for.

2 Q. Is it good or bad in Professor Gross' view?

3 A. Well, first of all, let me start by saying
4 that what this is referring to is quite specific. It
5 is uniformity of recovery by categories of claimants
6 meeting certain criteria.

7 And my answer to your question is that I am
8 what I would call value neutral as to this. It has
9 some positive aspects and it has some negative
10 aspects. I don't form a view one way or the other as
11 to whether it is good or bad, it is what happened.

12 Q. Okay. Professor, your next bullet point here
13 describing a new, although not unanticipated
14 consequences, including: -- of the TDP is reduced
15 payments to personal injury plaintiffs (from 100
16 percent for pre-C claimants to 10 percent for post TDP
17 claimants) with some delay in the timing of repayment;
18 is that right?

19 A. Yes. That is a correct reading of the bullet
20 point three.

21 Q. And do I understand from your prior testimony
22 that you consider that to be a good thing that the
23 payments were reduced?

24 A. I never said I don't believe that it was a

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1 good thing. I think what I said, and I believe what I
2 said is that it was an inevitable thing in light of the
3 financial jam that the trust was in.

4 And I think I also said that it was one of
5 the options that was employed to try to prospectively
6 address the trust's huge financial deficits, and I also
7 said to you that I did not think it cured its earlier
8 deficits. So, I don't think I said that it was to use
9 your words "good."

10 Q. Professor, in the next paragraph you go on to
11 say, do you not, that the TDP addressed certain of the
12 trust's deficits, but that unresolved issues remained.

13 A. Actually, quite specifically, what I said is
14 that not only did the TDP not resolve certain things,
15 it couldn't resolve certain things. So, it is both
16 that it did not do it, but it also was not capable of
17 doing it.

18 Q. Then you go on to enumerate four of what you
19 characterize an unresolved issues, as unresolved

20 issues.

21 A. Well, I have four bullet points, which some
22 of which have sub-parts within them, yes, four major
23 bullet points.

24 Q. Each of which is a major category of

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1 unresolved issues in your view?

2 A. Well, what this list of four bullet points
3 is, some of, it is not an exclusive, but it is a list,
4 the lead in, the unresolved issues include, and I have
5 listed four.

6 Q. What additional unresolved issues that are
7 not listed here do you believe pertain?

8 A. I would say that the other issues that I have
9 thought about are more speculative in nature than ones
10 as to which I have certain views, but they don't change
11 or alter or affect the analysis that I have given
12 here.

13 Q. Fair enough. Let's focus on the four
14 unresolved issues that you have identified here.

15 The first bullet point says that the total
16 number of claims against the trust far exceeded that
17 which was anticipated in the plan disclosure
18 statement. Then you go on to say that the trust
19 continues to see a monthly influx of new claims.

20 Did I read that correctly?

21 A. Yes.

22 Q. In what sense is the total --

23 In what sense has the TDP not addressed the
24 total number of claims against the trust?

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1 MR. MUNSON: Objection to the form.

2 It assumes that the, you are making an
3 assumption about her report that I don't think is
4 a fair characterization. But you can answer, if
5 you can.

6 Q. I would be interested to know what the
7 problem with the question was.

8 MR. MUNSON: That's okay. Go ahead, if you
9 can answer.

10 A. What I am trying to point out here is that
11 the TDP resolved certain specific identified problems
12 and was a way of trying to resolve those so the trust
13 could continue to function, because it became very
14 clear that it was dysfunctional, not functional.

15 The TDP does not address what will happen or
16 how to resolve, what the TDP doesn't do is it doesn't
17 necessarily solve the problem of what to do if claims
18 continue to grow much more rapidly or change in the way
19 that they come about.

20 The TDP solves a set of problems, it is not a
21 solution in perpetuity for everything. And so, what I
22 tried to do here is identify things that remained for
23 me open issues, notwithstanding the TDP.

24 In other words, the TDP solved a group of

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1 issues, it doesn't mean it solved everything in
2 perpetuity.

3 Q. Understanding that your view is that the
4 TDP did not resolve everything in perpetuity, well --

5 Let me ask you something different.
6 Is it your understanding that the trust
7 currently pays its claimants 10 percent?

8 A. From what I have read and from the documents
9 that I have looked at, yes, the TDP appears to be
10 paying 10 percent of the allowed claim and of the
11 claimants, which means that the TDP is paying 10
12 percent of the asbestos liability of people who have
13 been injured, were injured.

14 Q. And do you have an understanding as to
15 whether or not the TDP has a provision that permits for
16 that 10 percent amount to be adjusted in the event that
17 the trust projected liabilities turn out to be
18 different from its actual liabilities?

19 A. Yes, I am aware that it has such a provision,
20 that in some respects deals with what to do if claims
21 go --

22 Let me state it more clearly.

23 There is a provision in the TDP related to
24 adjusting that 10 percent upward or downward as may be
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1 needed.

2 Q. Okay. Given that provision in the TDP, my
3 question to you is how the TDP does not resolve the
4 issues raised by the total number of claims against the
5 trust as identified in your first bullet point here.

6 A. There are two ways in which this bullet point
7 remains accurate, one is retrospective and one is
8 prospective. Retrospectively, looking back the TDP
9 could not fix the fact that the number of claims far
10 exceeded anything which the trust anticipated and
11 hence can't fix, the TDP can't fix the fact that some
12 claimants got paid in full 100 percent of their allowed
13 claim and other claimants haven't.

14 As to the prospective part of it -- one can't
15 as much as the TDP has in it a provision for adjusting
16 pay-outs upward or downward, should there be a dramatic
17 shift the TDP may not be in a position prospectively
18 either to function well or to, to function well or to
19 function in the manner that it is required to function
20 to be in compliance with the bankruptcy law
21 provisions.

22 I can't say that yet, I don't know what will
23 happen in the future. So, for me there are both
24 retrospective and prospective issues that remain
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1 unresolved.

2 Q. With respect to the retrospective issue as
3 you identified it, that is addressed in your second
4 bullet point, here; is it not?

5 A. Actually, the first and the second bullets
6 are discussing related but not identical issues. They
7 are going at somewhat different more subtle, a subtle
8 distinction which I am happy to make for you.

9 The first bullet is going to the aggregate
10 number of claims, the total number of claims. The
11 second one is going to the fact that within that big
12 number some particular group got specifically
13 identified to get paid more than another group.

14 And that is an important difference. One
15 goes to the overarching number of claimants, the second

16 part goes how they picked and chose among those as to
17 which would get paid how much and certain specific
18 subgroups of claimants were able to get more of the
19 limited pot than others.

20 That's a difference between bullet point one
21 and bullet point two, among other differences.

22 Q. With respect to what you described as the
23 prospective element of the first bullet point, do you
24 think it is a good thing or a bad thing that they, the
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1 TDP provides that the 10 percent payment can be
2 adjusted if necessary to equalize payments among trust
3 beneficiaries?

4 A. Asking you what is good or bad depends on
5 what is good or bad, from whose perspective and what
6 purpose I am assessing good or bad. And there are lots
7 of ways of assessing good or bad.

8 Q. Professor, don't go through in your two
9 reports and critiquing eventually the trust and its
10 operations?

11 A. In my reports, I critique lots of things, I
12 critique the trust and its operations, but I critique
13 its structure. I critique the influence, who
14 influenced it, I critique how it got created, I
15 critique how it made the choices it made and did
16 not make. I critique a number of features of which you
17 have just mentioned two.

18 Q. Okay. You raise various alternatives
19 throughout your reports in terms of ways that the trust
20 could have improved upon itself; do you not?

21 A. Well, what I lay out are options that were
22 available to the trust.

23 Um, recognizing the situation it was in and
24 all of the influences with which it had to deal. And I
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1 think what I indicate in my reports is that I set out
2 the options and then the trust made its own assessment
3 of options, and which ones to choose and which ones not
4 to choose and the strengths and the weaknesses of those
5 choices in light of its situation. I think that is
6 what I do.

7 Q. Professor, do you think that attempting
8 to equalize the payments of the percentage pro rata
9 percentage of payment that the trust's beneficiaries
10 will receive from the trust is appropriate?

11 MR. MUNSON: Objection to the question, it is
12 ambiguous. I don't know what you mean by equalize
13 payments.

14 Q. The pro rata payment percentage.

15 A. Do you want to just read me the question
16 back.

17 Q. Professor, my question, you criticize the
18 trust for having paid certain claimants 100 percent and
19 paying other claimants a smaller amount; do you not?

20 A. Critiquing is your word and not mine.

21 What I would tell you is that my expertise
22 tells me that bankruptcy is designed to accomplish
23 certain things and one of those is fair and equitable
24 treatment of, fair and equitable treatment of
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1 creditors.

2 What my reports tell you is that the trust
3 did not do that. And it did not do that because it
4 singled out certain groups of creditors to be paid
5 earlier, sooner and more than other groups of
6 creditors.

7 And that is what my report tells you.

8 And it also tells you that when it got into
9 this terrible jam where it couldn't pay everybody, it
10 had to make certain adjustments and that in doing that
11 it may have tried to fix a situation, but it couldn't
12 fix it completely.

13 There was no way in many respects to fix a
14 fundamental flaw, and so what I am telling you is that
15 the fair and equitable treatment of creditors, which is
16 a requirement of the bankruptcy law, was something that
17 the trust did not do and still cannot do.

18 Q. Professor, let me rephrase my question then.

19 In your view is the TDP provision that allows
20 for the 10 percent pro rata payment to be adjusted
21 in the event that the trust's projections of its
22 liabilities over time turns out to be inaccurate, in
23 furtherance of the goal of fair and equitable treatment
24 of creditors?

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1 A. There is what I would call short-term
2 improvements versus overall systemic solutions.

3 What was done in the TDP was to try to fix
4 a problem in a short-term way recognizing the things,
5 that things had not gone well and recognizing lots of
6 things that contributed to the deficiencies of the
7 trust.

8 That fix lowering the percentage of pay out
9 helps to solve a terrible situation. It doesn't fix
10 though the big overarching problems, so what we have is
11 an effort to resolve on a short-term type of basis, a
12 problem, but you have to recognize that it doesn't fix,
13 doesn't go back and fix the whole set of problems.

14 Q. Professor, in what respect is the TDP a
15 short-term fix?

16 A. Perhaps I could have chosen a better word
17 than short-term fix. I would perhaps replace it with a
18 current fix.

19 The trust faced a crisis and something had to
20 be done and this the TDP was the way of fixing that
21 crisis. And in ways it fixed it, and in other ways it
22 left new issues. But what it did not do and what it
23 couldn't do is it couldn't go back in time and fix a
24 long history and very complicated and entrenched

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1 problems that existed.

2 Q. Okay. With that, let's return to our
3 discussion of the TDP provision that allows the 10
4 percent pro rata share to be adjusted upward or
5 downward in the event that the trust's projections of
6 its liabilities turns out to be inaccurate.

7 MR. MUNSON: Counsel, we have been going
8 about an hour and 20 minutes, I would like to take
9 a short break.

10 MR. FINK: Okay, counsel. I would have
11 preferred that you not interrupted me in the

12 middle of a question. But let's go off the
13 record.

14 MR. MUNSON: I thought you were at a
15 convenient time. If you want to go ahead, we
16 could -- I would assume that you finish a topic
17 before we break, and if you are going to do it
18 relatively soon, let's continue on the record.

19 MR. FINK: Let's stay on the record.

20 Q. Professor Gross, we have been discussing
21 intermittently the TDP provision that permitted for the
22 10 percent pay out to be adjusted upward or downward
23 in the event that the trust's projection of its
24 liabilities turned out to be inaccurate.

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1 Would you agree with me about that? Are you
2 familiar with the TDP provision that I am talking
3 about?

4 A. There are lots of parts of your questions
5 to agree with or disagree with. I do know that I am
6 familiar with the TDP provision to which you are
7 referring but --

8 Q. That's all I want to know. I want to make
9 sure that we are on the same ground. Is that TDP
10 provision consistent with the goal of fair and
11 equitable treatment of creditors?

12 MR. MUNSON: Objection. Asked and answered.
13 That was your immediately preceding
14 question.

15 Q. No, my preceding question was if it was
16 in furtherance of, and I don't believe it was ever
17 answered. I would like an answer.

18 MR. MUNSON: Your distinction, one
19 question was in furtherance of, the other question
20 was what --

21 Q. Whether it was consistent with -- and I don't
22 believe it was answered.

23 MR. MUNSON: Just so I understand the
24 differences in your question. One question was

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1 whether it was in furtherance of and one question
2 was whether it was in --

3 MR. FINK: That was the difference in the
4 question, aside from the fact that it was --

5 I don't think it was ever answered.

6 MR. MUNSON: Do you understand the question
7 that is in front of you right now?

8 THE WITNESS: I don't understand the
9 difference between this question and the last
10 question.

11 A. Maybe what I would say to you is that the TDP
12 is an effort to solve a problem. Because of the
13 magnitude of the problem it is not a perfect solution.
14 And among the options is it better to try at a certain
15 point in time to make sure that at least some group of
16 creditors is treated the same as each other, yes.

17 But is it optimal that some people get a 100
18 and some get 10, and some get one and some get 40, no,
19 that is not optimal.

20 So, I guess what I would tell you is for me
21 the TDP was a negotiated effort with lots of parties
22 participating to come up with a solution to a very bad

23 situation. But, it is not perfect and it doesn't fix
24 the past; that's what I tell you.

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1 Q. Okay, Professor, I appreciate all that.

2 I would appreciate an answer to my question
3 which is whether the, not the TDP overall, but whether
4 the TDP provision that we have been discussing is
5 consistent with the goal of fair and equitable
6 treatment of creditors?

7 A. I think what I have said to you, and I am
8 just repeating now, in some ways it is and in some ways
9 it is not.

10 Q. In what way is that specific provision,
11 not the TDP as a whole, in what way is that specific
12 provision not consistent with the goal of fair and
13 equitable treatment of creditors?

14 A. There are several ways in which it is not,
15 but I will give you one example.

16 Fair and equitable treatment assumes that
17 whenever claimants are paid over the course of time if
18 they are similarly situated they will get paid the same
19 amount.

20 It shouldn't matter when you are injured, if
21 you are entitled to be paid everybody should be paid an
22 amount, the same amount. In other words, future
23 claimants are entitled to the same amount for their
24 injury as those who are injured earlier. And they

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1 shouldn't get less by the accident of time.

2 And what this provision means as implemented
3 is that some people by the accident of time will get
4 paid more and other people will get paid less.

5 That's not what fair and equitable meant, in
6 the bankruptcy code, it meant all similarly situated
7 creditors will be paid a like amount for their injuries
8 and that is not happening.

9 And that provision, which shifts the amount
10 people can be paid while it has certain benefits does
11 not enable all creditors to be paid equally whenever
12 their injury arose.

13 Q. Professor, is it your view that it would be
14 more consistent with the goal of fair and equitable
15 treatment of creditors for the TDP to lock in a 10
16 percent payment percentage regardless of what
17 eventuates in the future?

18 A. I am not going to speculate on what other
19 provision. This was a negotiated settlement and there
20 were trade offs for why they got what they got and why
21 they did certain things versus certain other things.

22 So, I would not want to speculate as to --

23 (Phone ringing).

24 THE WITNESS: Should I keep --

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1 Q. Go ahead.

2 A. I wouldn't want to speculate as to what
3 other provision they might have employed or what the
4 strengths or weaknesses of some other provision, what
5 we have got is a provision now in an agreement that was
6 negotiated. And my comments are addressed to whether I
7 think that provision and its operation supports fair

8 and equitable treatment.
9 MR. MUNSON: Counsel, why don't we stop now
10 so that we can turn off the phone (A), and (B) to
11 take a short recess.

12 MR. FINK: Fair enough.

13 THE VIDEOGRAPHER: We are now going off the
14 record and the time is 11:43 a.m.

15 (Recess).

16 THE VIDEOGRAPHER: Stand by, please.

17 We are now going on record, the time is
18 12:02 p.m.

19 Q. Professor Gross, I would now like to turn
20 to your third bullet point identifying what you have
21 referred to as unresolved issues or issues unresolved
22 by the TDP.

23 And that bullet point says a significant
24 number of claimants had their claims settled without

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1 adequate or accurate information, meaning that their
2 ultimate pay out was inappropriate. Did I read that
3 correctly?

4 A. Yes, you do.

5 Q. What time period are you making reference to
6 in this bullet point?

7 A. My reading of the documents suggests
8 that there was a difficulty with claims settlement in
9 terms of both adequacy and accuracy of information that
10 ran from actually pre-consummation, but ran from
11 post-consummation as well forward in time.

12 And the TDP did not fix what happened
13 before it went into effect, and it did not fix claims
14 resolution in these respects even after it went into
15 effect.

16 So, it actually covers a very long period of
17 time.

18 Q. Have you made any effort to quantify the
19 extent to which the ultimate pay out was inappropriate
20 in your view?

21 A. I have looked at a number of documents which
22 have indicated deficiencies in the claims resolution
23 process, internal documents to the trust indicating
24 concern about this. But I have not specifically

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1 quantified in a collective way the dollar amount that
2 those deficiencies yielded.

3 As a law professor that quantification is
4 not something that I do, I have a task of looking at
5 facts and then analyzing it, assessing it, evaluating
6 it and making my best professional judgment as to what
7 it means; and I have left quantification to someone
8 else.

9 Q. Professor, on page 9 of your report the
10 first full paragraph, is this paragraph an effort to
11 summarize the opinions that you have reached in this
12 supplemental report?

13 A. Once again, let me just reread the
14 paragraph.

15 Q. Please do.

16 A. I am sorry. Could you now, now that I have
17 looked at the paragraph, would you reread your question
18 to me.

19 Q. I can't read it but I can restate it.
20 And the question is simply, whether this
21 paragraph is an effort to summarize the opinions that
22 you have set forth in this supplemental report?

23 A. I would characterize this paragraph a little
24 bit differently than that. I would say that this

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1 supplemental report is linked to the first report, in
2 very significant ways, and what the first report talked
3 about amongst many things is with lots of opinions
4 within the major categories was whether the purposes of
5 Chapter 11 had been fulfilled.

6 And what this paragraph is addressing is
7 whether in this new time period that this supplemental
8 report covers how are those two identified purposes of
9 Chapter 11, which remained important, what happened to
10 them in this next period.

11 That's what this is getting at. And the
12 support from my answer to that is everything that
13 appears in the pages preceding that.

14 So, what this paragraph is doing is it is
15 applying what comes before it to the purposes that were
16 developed and analyzed and assessed in the first report
17 and now moving them forward in time, asking in light of
18 everything here what happened to those two purposes.

19 Q. Professor, I am correct am I not in
20 understanding that your first report addresses four
21 categories of opinions, if you will.

22 A. It has four overarching questions and lots of
23 sub-questions that had to be asked and answered to
24 answer the big four questions; yes.

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1 Q. Fair enough. If you look at pages 2 and 3 of
2 your original report.

3 A. The original one?

4 Q. Yes. You will see that the paragraph that
5 carries over from page 2 to page 3 sets forth in
6 general what those four, I think you called them large
7 questions, what those four questions are.

8 A. Yes.

9 Q. My question to you is, does your supplemental
10 report attempt to address in any manner the subject of
11 the third question, which is in light of what was known
12 pre-consummation about the financial condition of the
13 trust what if anything should have happened before
14 consummation occurred?

15 A. In a sense the second report also touches
16 on that question, because you can't figure out what
17 happened at the end of the day if you don't go back and
18 figure out how you got there.

19 And so, the second report recognizes and
20 acknowledges and deals with things that did occur
21 before consummation, because it is only if you
22 understand those that you can understand what happened
23 post-consummation.

24 So, I would answer your question that there

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1 are aspects of number three there that do impact on my
2 assessment in the supplemental opinion.

3 Q. Okay. But I think my question is a

4 different one, which is whether your supplemental
5 opinion discusses the topic raised by question number
6 three.

7 A. It does not do it as directly as the
8 first report. Some of it is contained early on in the
9 second report, where I talk about what was known
10 pre-consummation.

11 Q. Can you point me to the portions of your
12 supplemental report that address question three?

13 A. I would say some of the material on page 3
14 and the top of page 4 go to those issues.

15 Q. Can you point me specifically to what
16 portions you are talking about?

17 A. Question three, which is the one you are
18 referencing is in the original opinion at about pages
19 19 through 22.

20 Q. I did not mean to cut you off.

21 I am asking in the supplemental report if you
22 can point me to the language in the supplemental report
23 that addresses question three?

24 A. I am showing you that because the second,

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1 supplemental report specifically cross references the
2 third opinion by page number and it is in the language
3 on page 4 at the top, that says both the trust staff
4 and the selected beneficiary counsels knew as described
5 in the expert report at pages 16 to 17 and 19 to 21,
6 about the trust's mismatch between assets and
7 liabilities before consummation.

8 And the lead in to that also talks about the
9 decisions and choices made and not made by the trust in
10 respect of the claims that exacerbated its financial
11 plight.

12 So there are aspects of this supplemental
13 opinion that are drawn from, rest on, as a backdrop to
14 that which is done here in the second.

15 Q. Looking back to your original report for
16 a moment, page 3, question 4 -- if I can try to
17 characterize it and correct me if I am wrong, is you
18 are discussing what were the most important reasons why
19 neither Manville nor the trust at any time before this
20 lawsuit was brought, brought an action against the
21 tobacco industry; is that basically right?

22 A. Well, this is asking a question in two time
23 frames, the debtor and the trust not pursuing claims
24 against the tobacco companies pre-consummation and then

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1 the trust not pursuing claims post-consummation until
2 implementation of the TDP.

3 So, it is discussing two different time
4 periods.

5 Q. With that explanation, is question four
6 addressed anywhere in the supplemental report?

7 A. Yes. It is addressed in the second report,
8 not at the length that it is discussed in the first
9 report, but in the context of considering the options
10 that were available to the trust and the options that
11 it had to assess and consider post-consummation, it is
12 one of those options and is referenced in the second
13 supplemental report.

14 Q. Can you point the reference to the

15 possibility of the trust suing the tobacco company in
16 the supplemental report?

17 A. Yes. There were several general references,
18 but the specific one that is right in front of me is
19 the one on page 5 at the bottom, and this is in the
20 context of talking about what options were available
21 for consideration by the trust and among the options
22 that were available included, and then at the bottom of
23 the page fourth bullet point pursuing other assets is
24 the language.

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1 Q. So, you view a suit by the trust against the
2 tobacco industry as being one way that the trust could
3 pursue other assets; is that right?

4 A. I am sorry. I --

5 Q. Can you just read that back.

6 (Record read.)

7 A. I think one thing that the trust had to
8 consider is whether it had an asset and if it did
9 whether it should pursue it and whether it was worth
10 pursuing.

11 And when one thinks about this, as a
12 bankruptcy expert the term assets can include causes
13 of action if they existed.

14 Q. This lawsuit, the Falise versus American
15 Tobacco Company case is an effort by the trust to
16 pursue additional assets for distribution to its
17 beneficiaries; isn't it?

18 A. I would characterize this lawsuit
19 somewhat differently as I understand it, but that is my
20 interpretation of what you are seeking rather than your
21 own. I would say what this is doing is that the trust
22 experienced an economic shortfall and is unable to
23 fulfill its obligations, and that the trust encountered
24 these difficulties for a variety of complex reasons

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1 including its structure, how it paid claims, what it
2 paid, how many it paid, the basis upon which it paid
3 them, all sorts of things.

4 And it made choices and elects certain
5 options and not other options, and what it is now
6 seeking to do is recover a shortfall from the tobacco
7 companies. That's what I would say it is trying to do
8 now.

9 Q. Would you agree with the statement that this
10 lawsuit is an effort by the trust to pursue additional
11 assets?

12 MR. MUNSON: Objection. Asked and answered.

13 A. I have answered that question as best I am
14 able.

15 Q. I believe you testified before that you have
16 at least met Professor Schuck; is that right?

17 A. Yes, I have.

18 Q. You understand that Professor Schuck has been
19 designated as an expert witness in this lawsuit?

20 A. I came to know that only after I had written
21 both my reports, when I was sent a copy of a report
22 that he did, and it was only at that time that I became
23 aware that he was, had written a report.

24 I don't know that he has been, I don't know

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1 the formal terminology as to whether he has or hasn't
2 been designated.

3 Q. Have you reviewed the report that Professor
4 Schuck prepared?

5 A. Subsequent to writing both of my reports I
6 have read his report and his supplemental report.

7 Q. Do you know whether or not Professor Schuck
8 has been deposed in this case?

9 A. It is my understanding that he has been
10 deposed.

11 Q. Have you reviewed the transcript of that
12 deposition?

13 A. No. I have not.

14 Q. Are you aware that during his deposition
15 Professor Schuck agreed with the statement that in 1988
16 it could be documented that the tobacco industry had
17 for decades intentionally deceived the government and
18 the public by withholding, suppressing and distorting
19 research on the dangers of smoking and the synergistic
20 effects of smoking and asbestos exposure?

21 A. I have no knowledge as to anything that
22 Professor Schuck said in his deposition.

23 Q. Are you aware that during his deposition
24 Professor Schuck testified that it could be documented

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1 in 1988 that the tobacco industry had developed but
2 then suppressed and refused to market a safer
3 cigarette?

4 MR. MUNSON: Objection to the question on the
5 grounds that she has already testified that she
6 had no knowledge about the Schuck deposition.

7 You are just reading another quote to her.

8 A. I had no idea what he said at his deposition.

9 Q. Professor, if it is true that it could be
10 documented in 1988 that the tobacco industry had for
11 decades intentionally deceived the government and the
12 public, who in your view as between the tobacco
13 industry and the trust claimants should bear the burden
14 of the trust's current financial difficulties?

15 MR. MUNSON: Objection to the question on
16 the grounds that it is unclear what the word
17 documented means, and it makes a number of
18 assumptions of facts that are not in evidence.

19 A. If you want to clarify the question for me
20 and be more specific, I can try to answer.

21 Q. Can you read the question back.
22 (Record read.)

23 A. I think this is mixing two completely
24 separate issues together here.

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1 Whatever liability the tobacco industry does
2 or doesn't have to people that is a separate question.

3 And that is one that I leave to others to
4 assess and resolve. The question that I have been
5 looking at is how did this trust, which grew up in this
6 bankruptcy out of this bankruptcy, how did it pay the
7 people that it was obligated to pay pursuant to the
8 terms of the plan of reorganization.

9 And at the end of the day when there was such
10 a shortfall what steps along the way contributed to the

11 trust being in that posture. That's what I looked at
12 and that for me is the question, and I have assessed
13 the trust responsibilities and the influences that
14 played on the trust for what happened to it. That's
15 what I have done and that's my answer.

16 Q. Professor, I appreciate that the question I
17 asked you is one that you would like, and I am using
18 your words, to leave to others to resolve, but
19 nonetheless I would like you to answer it.

20 A. I only want to leave part of it to others to
21 resolve. I am happy to answer the part about, what do
22 I think happened to this trust, how --

23 Q. Professor, I would like you to answer the
24 question that I asked you.

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1 MR. MUNSON: Counsel, counsel, I object to
2 you interrupting the witness.

3 If you ask a question and the witness is
4 answering your question, she is entitled to finish
5 answering the question.

6 MR. FINK: She is entitled to answer the
7 question I asked.

8 MR. MUNSON: The fact that you do not like
9 the answer does not give you the right to
10 interrupt her answer.

11 You are free to ask her another question of
12 any kind that you like.

13 MR. FINK: Okay.

14 A. What I was saying is, I answered half of,
15 half of your question; the part that I can't answer,
16 which is that I really looked at the trust, its
17 lineage, its structure, its behavior, its organization
18 and I understand why that trust got into the position
19 it got into. That's what I can speak to, why it got
20 into the position that it did.

21 I have not looked at nor am I looking at
22 what the tobacco companies did or did not do in their
23 business.

24 That is that subject, what the tobacco

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1 companies did or did not do is a separate question that
2 I have neither looked at and that I do leave to others
3 to answer.

4 MR. FINK: You are done. Let's go off the
5 record, we have to switch videotapes.

6 THE VIDEOGRAPHER: We are now going off the
7 record and the time is 12:29 p.m. and this is the
8 end of the tape labeled number 5. This videotape
9 deposition will continue on the tape labeled
10 number 6.

11 (Recess).

12 THE VIDEOGRAPHER: On the record.

13 Stand by, please.

14 This is the tape labeled number 6 of the
15 videotaped deposition of Professor Karen Gross.

16 We are now going on the record, the time is
17 12:31 p.m.

18 Q. Professor Gross, I am going to try, again, I
19 will try this again and I would like you to listen
20 carefully to my question because I am not asking you
21 to make any evaluation of the tobacco industry

22 misconduct.

23 And, so I will ask you to listen carefully to
24 the question and then to answer it.

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1 The question is, if it is true that the
2 tobacco industry has for decades intentionally deceived
3 the government and the public then who as between the
4 tobacco industry and the trust's beneficiaries should
5 bear the burden of the trust's financial difficulties?

6 MR. MUNSON: Objection. Asked and answered.

7 A. I have nothing further to add other than that
8 which I have already stated.

9 Q. So, am I correct in understanding that you
10 had no answer to that question?

11 MR. MUNSON: Objection.

12 Argumentative -- the witness and counsel.

13 You asked a question and she gave a answer,
14 and you asked again and she said she couldn't give
15 anything further. And you are now improperly
16 arguing and trying to provoke the witness.

17 MR. FINK: The question was never answered,
18 counsel. That's okay.

19 I have nothing further for you at this time,
20 Professor Gross.

21 MR. MUNSON: All right.

22 Let's go off the record.

23 THE VIDEOGRAPHER: We are now going off the
24 record, the time is 12:33 p.m. and this is the end

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1 of the tape labeled number 6.

2 This concludes the videotaped deposition
3 of --

4 MR. MUNSON: No, it doesn't conclude the
5 videotaped deposition.

6 THE VIDEOGRAPHER: I am sorry.

7 MR. MUNSON: We are going off the record for
8 a break.

9 THE VIDEOGRAPHER: We are now off the record,
10 the time is 12:33 p.m.

11 (Recess.)

12 THE VIDEOGRAPHER: Stand by. We are now
13 going on the record, the time is 103 p.m.

14 BY MR. MUNSON:

15 Q. Professor Gross, I have got just a couple of
16 quick questions that I wanted to ask you following up
17 on some of your earlier testimony.

18 You testified at some length about your
19 experience and training and education and work that you
20 have done and what I would like to do is to ask you to
21 tell us what is the expertise that you have that in
22 your view is pertinent to the work that you have done
23 in this case? Can you do that?

24 A. Yes. All right.

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1 Um, I spent the last 20 years thinking about,
2 writing about, speaking about and analyzing the
3 bankruptcy system. And I have done that in a variety
4 of ways, and if I can turn to the resume that may make
5 that even clearer. In the most general terms I have
6 done it by --

7 Q. You are looking at now what exhibit?

8 A. I am looking at appendix A to the
9 supplemental report.

10 Q. Okay.

11 A. I have done it through my role as an
12 academic, which includes reading the academic
13 literature, remaining current on everything that
14 happens in my field, and I have done it through my
15 practice, experience both before I entered academia and
16 subsequent there to.

17 I have done it by participating in a variety
18 of bar association activities and through a variety of
19 speeches that I have given.

20 But, if one focuses even more thoroughly,
21 what have I done that relates to Chapter 11, which is
22 what we are talking about here, let me point to some
23 specific things that relate to Chapter 11.

24 And since there is no specific subchapter of
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1 the bankruptcy law related to mass tort bankruptcies,
2 let me talk about Chapter 11 generally since what
3 applies to Chapter 11 applies to mass tort cases.

4 So let me start with my book. My book
5 addresses Chapter 11 in significant detail, in terms of
6 other articles that I have written that specifically
7 address Chapter 11.

8 I wrote a piece with someone who was then
9 my law student and now is a practicing lawyer on
10 bankruptcy solutions in the United States, an
11 overview. And that is a piece on Chapter 11 in the
12 context of a conference that looked at Chapter 11 in
13 the United States as a touchstone for thinking about
14 corporate reorganization in emerging nations.

15 Q. Is this listed in your resume?

16 A. Yes.

17 Q. Where is it?

18 A. The sixth article down in the list of
19 articles on page 2.

20 Q. So the title of it is what?

21 A. Bankruptcy Solutions in the United States: an
22 Overview.

23 MR. FINK: Is there a pending question?

24 MR. MUNSON: Yes.

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1 MR. FINK: I think the last question was,
2 which is -- or something like that.

3 Q. Go ahead, Professor.

4 A. The article that appears two down on that
5 list, in Defense of Debtor Exclusivity assessing four
6 of the 1994 amendments to the bankruptcy code, is
7 dealing with changes to the bankruptcy law that affect
8 Chapter 11 and how to think about Chapter 11 and what
9 would make it work well and what makes it not work
10 so well.

11 Q. Any other articles on Chapter 11?

12 A. Yes. I will give you two more right here.

13 On the next page of the resume there is one
14 called Debtors Out of Control, a look at Chapter 11s
15 check and balance system, which is looking at how
16 Chapter 11 functions and how the various constituencies
17 in the Chapter 11 work or don't work well with each

18 other.

19 And lastly, I refer you to the piece called
20 an Overview of the Bankruptcy Reform Act of 1978, which
21 discusses the difference between Chapter 11 now under
22 the current law versus the old law.

23 So, those articles demonstrate my experience
24 in, my knowledge of and understanding of Chapter 11,

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1 and then there have been some other writings I wrote on
2 expert panels in Chapter 11 and the need for expert
3 panels, which addresses how to think about the costs
4 and functioning of Chapter 11 and what would make it
5 work better. And then I also --

6 Q. Is that an article that you are specifically
7 referring to?

8 A. It is a very short article, it appears on,
9 in my resume under other publications, because it is
10 shorter in length than some of the others.

11 Q. Where's that on your resume?

12 A. It shows up on page 4, and it is slightly
13 past the middle of the page.

14 Q. What's the name?

15 A. It is Expert Panels: A recommendation to the
16 National Bankruptcy Review Commission.

17 And lastly while on that page 2 down from
18 that, is a bibliography that I did on bankruptcy
19 ethics, which relates to a number of articles involving
20 ethical issues that arise in Chapter 11 cases, and this
21 is a detailed bibliography of those articles, which has
22 actually been reprinted and cited by professionals for
23 containing the majority as of this date of articles of
24 the ethical issues in Chapter 11.

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1 Q. What's the title of that article?

2 A. That article is entitled Selected
3 Bibliography on Ethics for Bankruptcy Professionals:
4 attorneys, judges, trustees and committees.

5 Q. Any other publications on Chapter 11?

6 A. There may be others that touch on it, but I
7 would say this is the a fair representation of those on
8 the list. There are certainly others I have written on
9 single asset Chapter 11 cases, there are certainly
10 others that touch on it, but these are a representative
11 and significant sample of that which I have done.

12 Q. You were asked some questions earlier in this
13 deposition about mass torts and asbestos. And what I
14 would like you to do is to tell us what the basis is
15 for your knowledge about mass torts and asbestos,
16 separately. Do mass torts first.

17 A. Um, well, let me begin my saying, by saying
18 that my knowledge of mass torts is informed by my
19 knowledge of Chapter 11, because if you understand
20 Chapter 11 you will be able to address the issues in a
21 mass tort case; while mass tort cases are bound by the
22 same provisions that govern all Chapter 11 cases.

23 So, everything that I just gave you plus
24 various bar association committees on which I have

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1 served, including a joint business law and litigation
2 task force on bankruptcy structure and the insolvency

3 process all go to that. But turning very specifically
4 to mass tort issues, let me discuss first what I have
5 done in terms of my teaching.

6 In my teaching I have taught mass tort issues
7 in both my basic bankruptcy course and in my more
8 advanced course, indeed in my advanced course I have
9 used in the past a book, one-third of which is
10 dedicated to the Johns-Manville case.

11 Q. What's the title of the book?

12 A. It is called Strategic Bankruptcy, and it is
13 by someone named Kevin Delaney.

14 Q. It is a textbook?

15 A. No. Actually it is not a textbook, he is an
16 academic, but it is a book about corporate bankruptcy
17 which we read in the course in which he analyzed and
18 assessed his understanding of three major mega Chapter
19 11 cases. And I have used that book as a way of
20 discussing Chapter 11 and in particular mass tort
21 cases.

22 I also have taught the cases in the case
23 book, which relate to mass torts, and I would say many
24 of those case books have included the, one of the

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1 Johns-Manville decisions within the case book itself.

2 In addition to that, I have also been the
3 moderator of programs at which mass tort issues have
4 been discussed, and I can specifically show you where
5 some of those appear, and these are programs in which
6 the topic of mass torts has been raised. So, let me
7 give you some.

8 I have participated for several years in
9 a program by the Southern Florida Bankruptcy Bar
10 Association, which is a retreat. And at that retreat
11 there are a number of problems that are presented to
12 participants that are discussed. And I did that
13 program in 1995, and I did that program in 1991 and
14 1992.

15 Q. Are these listed on your resume somewhere?

16 A. Yes.

17 Q. Where are they?

18 A. They appear at various pages in the
19 presentation that I have given. I can show you them
20 specifically.

21 For example on page 10, the fourth down is
22 one such group, one such program where I was a group
23 leader at which mass tort topics were addressed.

24 That program is one that I did the year

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1 before and that shows up at page 11, two down, on the
2 list.

3 I also did the program in 1991 and 1992 and
4 that shows up at page 12. And then there are programs
5 that I did which are somewhat similar in nature in
6 terms of being a group leader for programs that discuss
7 a variety of relevant bankruptcy issues, and another
8 such one is the Eastern District of Pennsylvania
9 Bankruptcy Conference, and while I gave a specific
10 presentation on mediation and bankruptcy, I also led
11 group discussions. And if my memory serves, mass torts
12 would have been included over the years in those
13 conferences; and those were in 1992 and 1993.

14 Q. Anything else that you can point to that
15 is the basis for your knowledge about mass torts
16 beyond the teaching that you have discussed and the
17 presentation that you have listed just now?

18 A. Well, I would also add before I get to one
19 final piece which is the material in my book on that, I
20 have done as an academic reading on this topic, part of
21 my job as an academic is to read, think about and
22 analyze the bankruptcy system so that I am familiar
23 with the literature that addresses mass torts issues.

24 I participate regularly in dialogues

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1 with academics and practitioners about the world of
2 bankruptcy, which has included the topic of mass torts.

3 Q. What sort of things have you read?

4 A. I have read law review articles, I have read
5 newspaper articles, which discuss mass tort issues.

6 Indeed, one of the articles that exists in
7 the academic literature on mass torts is one where I
8 served as the reviewer of that article for the person
9 who wrote it in the sense that I was delivered a draft
10 and read and critiqued that article.

11 Q. Which article was that?

12 A. It is an article on mass torts written by a
13 Professor Kathryn Heidt.

14 Q. Where was that published?

15 A. That piece was published I think in the
16 American Bankruptcy Law Journal.

17 Q. Is that a scholarly journal?

18 A. Yes. That is a scholarly journal dedicated
19 to the bankruptcy field.

20 I might add that I also serve on the advisory
21 boards of various publications. And in that context
22 for the American Bankruptcy Institute Law Review,
23 sitting on their advisory board we talk about what
24 articles should be published and how to think about

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1 what should go in an academic bankruptcy law journal.

2 And so I am familiar with the literature and
3 the topics that people are talking about and thinking
4 about, and have helped developed what should be in that
5 journal.

6 And there are other by the way similar
7 academic journals dedicated to bankruptcy that I have
8 read and regularly read as a part of what I do.

9 Q. You also mentioned that, earlier, that you
10 wanted to address some issues in your book.

11 A. Yes, I would.

12 Q. Your book again is entitled what?

13 A. My book is entitled Failure and Forgiveness
14 Rebalancing the Bankruptcy System.

15 I wanted to indicate that at a certain point
16 I had been asked if the only place in my book that I
17 mentioned mass torts was in certain number of I think
18 5 pages that specifically were referenced, and I
19 indicated in answering that there were lots of places
20 in my book where that topic was discussed, indeed the
21 concept of mass torts permeates the book.

22 And I thought it might be useful to identify
23 specifically for you some of those spots where that
24 occurs.

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1 Q. Please do, if you would.

2 A. Um, well just as a few examples, references
3 to mass tort cases appear on page 31 of the book, where
4 I talk about that many well known companies have
5 partaken of Chapter 11s, benefits and specifically
6 mention in that context Dow Corning, which was a mass
7 tort case.

8 Turning to another example on page 80 in the
9 book, where in the book I am discussing what's
10 happening in the bankruptcy system. I say in cases
11 involving mass torts such as those of the A.H. Robins,
12 the Dalkon Shield, Johns-Manville asbestosis and Dow
13 Corning silicone implants, the number of existing and
14 future claimants could reach the tens of thousands.

15 And then I go on to say in the book, in the
16 Johns-Manville case it was estimated that there were
17 more than 110,000 possible future claimants.

18 And I go on to explain that mega Chapter 11
19 cases of which mass torts are won are only a small, are
20 one, are only a small percentage of all filings and
21 that in chapter 11 is a small percentage of all filings
22 and mega mass tort cases are even a smaller
23 percentage.

24 An additional example appears on page 87

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1 where I discuss where the mega cases have gravitated,
2 which is the Southern District of New York, which is
3 where the Johns-Manville case took place.

4 Another such example appears and then
5 continues actually for several pages closely related,
6 pages 168, 169, 170, 171, and let me just read you a
7 part of those because I make a distinction between
8 what's known as voluntary and involuntary creditors.

9 And involuntary creditors are tort claimants
10 whereas voluntary creditors are those who choose to
11 lend money to a debtor. And then I talk about the
12 difference between tort victims and that some tort
13 victims are different from others, and that mass tort
14 victims are one sub category of tort victim and that is
15 dealt with at some length at page 170 to 171 of the
16 book.

17 And let me just read you, because what it
18 alerts you to is that, the depth of which I have
19 thought about these issues, if that is all right.

20 It says, and I am quoting from the book: But
21 not all tort victims are the same either. Some torts
22 result in monetary rather than physical injury.
23 Business interference and slander for example are torts
24 that do produce injury including monetary and psychic

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1 harm, but not necessarily bodily injury.

2 Also individual tort victims are different
3 from the victims of mass torts and not all mass tort
4 victims are equally situated.

5 And then I go on to explain that in the
6 previous example the tort creditor was not injured as
7 a result of a mass tort, and then I talk about in
8 contrast mass torts raise a serious issue of how to
9 address the potential and commonly unanticipated harms

10 that are a by-product of industrialization and
11 advancing medical knowledge, as more and different
12 products are developed. And as researchers learn more
13 about the long term effects between environment
14 chemicals, and health seemingly safe products become
15 the weapons of death.

16 Then I go on.

17 I will tell you that throughout my book, as
18 I indicated before but in very specific ways as well,
19 the issues that are relevant here are ones that I have
20 thought about, written about, spoken about in the
21 context of over 20 years of thinking about the
22 bankruptcy system.

23 Q. Professor, what about specifically, your
24 knowledge about asbestos related issues as a separate
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1 matter, as a basis of your knowledge of asbestos
2 related issues?

3 A. Um, well, as to asbestos issues, first of
4 all, there is no separate chapter for mass torts, there
5 is no separate chapter for asbestos cases either.

6 Q. Professor, I am not, excuse me for
7 interrupting, I am not asking you now about your book.

8 My question is broader than your book.

9 My question is, what's the basis for your
10 knowledge of about asbestos related issues, broadly,
11 not --

12 MR. FINK: I don't mean to interrupt you.

13 I was cautioned on the record many times for
14 interrupting the witness, and I believe you have
15 now done that on a number of occasions.

16 Q. Do you understand my question?

17 A. Yes. I do.

18 Q. Okay.

19 A. Not only am I familiar with bankruptcy
20 generally speaking, having spent 20 years thinking
21 about it, but I have also thought about Chapter 11 and
22 asbestos cases are part of Chapter 11 cases; there is
23 no special chapter for asbestos cases.

24 But then I have also thought quite

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1 particularly about mass tort cases, as I have
2 indicated. And then even more particularly as to
3 asbestos cases, I have actually taught about the
4 Johns-Manville case in particular.

5 Indeed, the book that I referenced earlier
6 Strategic Bankruptcy, one-third of it is dedicated to
7 Johns-Manville.

8 So I have actually taught students about
9 that case, and indeed in the case books that I use
10 Johns-Manville has been mentioned, and indeed on
11 several occasions actual opinions from the case have
12 been there.

13 I have actually taught the case itself to my
14 law students. So, in that context and in writing my
15 book I have not only read about and thought about and
16 specifically mentioned asbestos cases, but I have
17 actually taught them to law students.

18 Q. In your earlier testimony there were some
19 questions about your, the invited presentation section
20 of your resume, page 7.

21 And you talked about some of these
22 presentations concerning I think as you put it, an
23 intersection between mass tort and Chapter 11; do you
24 recall that?

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1 A. Yes.

2 Q. Can you, are there any of these presentations
3 as you look at these that you recall relate to that
4 issue that is the intersection of mass tort and Chapter
5 11?

6 A. Well, there are several presentations that
7 I did that address mass torts in Chapter 11, those
8 include the ones that I mentioned in the context of the
9 Southern Florida Bankruptcy Bar Association retreat.

10 That set of programs involves problems and
11 some of those problems grow out of mass tort issues.

12 In the context of those workshops I would be
13 addressing mass tort issues and Chapter 11 together
14 surrounding a problem that was being presented to the
15 group.

16 And would both participate in, hear, and
17 resolve issues involving mass tort and Chapter 11 with
18 the bankruptcy practitioners who were there at those
19 sessions.

20 Q. Other than the Southern Florida Bankruptcy
21 Bar Association meetings, are there any others of these
22 presentations where the intersection of Chapter 11 and
23 mass tort was at issue?

24 A. It was likely at issue in the programs that I
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1 did at the Eastern District of Pennsylvania bankruptcy
2 conference, which were also problem based programs
3 where you resolve a problem and mass tort issues would
4 have arisen there.

5 And let me suggest one other as an exemplar
6 program where this would have come up, which is in the
7 context of discussing releases in Chapter 11 plans
8 which is a question of who ultimately is relieved of
9 potential liability, and I did a program on that topic
10 for the American Bar Associations Chapter 11 meeting,
11 which is their specific subsection dealing with Chapter
12 11, in October of 1995, and that issue, the issue of
13 releases in Chapter 11 plans is one that comes up in
14 mass tort cases as well as in other kinds of Chapter 11
15 cases. So, that would be an example of where the
16 issues would intersect.

17 Q. Are there any others that you can think of
18 and if not, that's fine.

19 A. Ah, I think those are the ones that most
20 specifically come to mind.

21 Q. On a different topic, on your resume on page
22 2 you list the publication under books, Lady Lucy's
23 Quest, the unpublished fairy tale. And you were asked
24 some questions about this earlier in your deposition.

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1 Do you remember those questions?

2 A. Yes. I do.

3 Q. I have just a couple questions. Does this
4 fairy tale make any explicit reference to Chapter 11 or
5 fairness and integrity related issues?

6 A. No. Lady Lucy's Quest does not explicitly
7 reference Chapter 11.

8 Q. Do any of your other publications make
9 explicit references to Chapter 11 and fairness and
10 integrity related issues?

11 A. They most assuredly do.

12 I have written a number of articles that deal
13 explicitly with Chapter 11 in addition to my book, and
14 in the context of those articles like bankruptcy
15 solutions in the United States an Overview, or in
16 Defense of Debtor Exclusivity, or Taking Community into
17 Account, those articles specifically reference Chapter
18 11 and deal with issues of fairness and equity and
19 integrity within the Chapter 11 process.

20 Q. In the work that you did on this case to
21 date, have you made any study where you, were you asked
22 to or did you make any study of whether anything the
23 trust did here made claimants' sick?

24 A. No. I have not been asked to address that

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1 question, although I may have misunderstood an earlier
2 question where I thought I was being asked about
3 whether I thought that the trust caused people to get
4 asbestosis. So, I may have misunderstood a question,
5 but I was not asked whether the trust caused people to
6 be sick.

7 Q. Do you have any basis then to say whether or
8 not the trust had made people sick?

9 A. No. I don't have a basis to make that
10 assessment.

11 Q. Do you have any knowledge about whether the
12 trust made any warnings to asbestos workers at any
13 point along the way?

14 A. I don't know.

15 Q. Can you -- you were asked some questions
16 about the bankruptcy code and mass tort structure
17 organization and operation, earlier.

18 My question is, can you point to any examples
19 of the bankruptcy code and provisions of the code that
20 relate to or concern mass tort trust structure
21 organization or operation.

22 MR. FINK: Objection to the form of the
23 question.

24 Q. Is that clear?

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1 A. Yes. I can answer.

2 I am aware of and will give you specific
3 sections that relate to that because the sections that
4 worked for Chapter 11 work for mass trust torts because
5 a mass trust tort is like a half of a debtor.

6 In that sense let me give you some examples.

7 A trust has to deal with allowed claims,
8 which is a bankruptcy code provision.

9 A trust is not supposed to pay anything other
10 than people who are entitled to payment. A trust has
11 to pay in accordance with the bankruptcy code provision
12 about how creditors have to be treated fairly and
13 equitably, that is part and parcel of the bankruptcy
14 system and the means by which the trust has to
15 operate.

16 So those are examples of how the trust is

17 not unconstrained, the trust is governed by specific
18 provisions of the bankruptcy code as to what it can and
19 can't do and how it can and can't do certain things.

20 Q. You testified earlier in this deposition on a
21 section of the bankruptcy code, I believe Section 524
22 G; do you recall that?

23 A. Yes.

24 Q. I think you testified that you had not

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1 specifically reviewed Section 524 G in connection with
2 your work in this case. My question is, why not?

3 A. I did not review it specifically for purposes
4 of this case because it is not relevant --

5 Q. Why not?

6 A. -- to this case.

7 Well, it is not relevant for several
8 reasons. One is, I was asked to address how the trust
9 got in the situation that it got in, and the issues
10 raised by 524 G are not ones that informed that
11 assessment that I made.

12 I looked at facts and interpreted and
13 analyzed and thought about those facts and 524 G was
14 not one of those facts that I looked at.

15 Moreover, 524 G, Section 524 G came into
16 being in 1994. And the facts that I was looking at
17 all, not all but many antedated 1994.

18 And so the introduction of the channelling
19 injunction after the fact is not relevant to what I did
20 and how I thought about all of this.

21 I am certainly aware of the section, it is
22 not a section that is impacted by or relevant to that
23 which I did here.

24 Q. Earlier today you testified, you were asked

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1 some questions about the number of claims that have
2 been asserted against the trust; do you recall that
3 testimony?

4 A. Yes.

5 Q. And my question is this, what if any
6 relationship is there between the number of claims
7 asserted against the trust and how those claims against
8 the trust have been handled by the trust?

9 A. There is a very important relationship
10 between the number of claims and how those claims are
11 assessed. A number, you just can't look at the number
12 of claims, freestanding, because it doesn't in and of
13 itself answer the important, all the important
14 questions.

15 You have to think about how did the number
16 get big, and then once you have the size of the number,
17 what did people do with the claims. How did they pick
18 and choose which ones got paid, how accurately were
19 they paid, what influenced the way claims were paid.

20 All of those factors, which inform really
21 what you do with the number help explain why the number
22 in and of itself is not enough to tell you what
23 happened here.

24 So, there is a direct relationship between

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1 number and treatment and influence and impact, all of

2 which go to understanding what happened here.

3 Q. In your view is there anything that the
4 trust did that, with respect to claims, that affected
5 the number of claims that were brought against the
6 trust?

7 MR. FINK: Objection to form.

8 A. I think there may have been from my reading
9 of the materials several things that happened that may
10 have caused the actual number of claims to have
11 increased.

12 The standards pursuant to which claims were
13 assessed, in other words how much proof there had to
14 be and how carefully claims were assessed could have
15 affected the number, increased the number of claims.

16 Another way that the trust behavior could
17 have affected the number of claims is that unless
18 certain claims were brought at certain times under the
19 way the trust was structured it might not have been
20 possible or people may not have thought that they would
21 have gotten paid.

22 So, certain timing of claims and number of
23 claims happened because of the way the trust behaved
24 and what it did and how it was structured.

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1 So, it is my, my answer to your question that
2 the trust's behavior not only could but did affect the
3 number of claims based on everything that I have read.

4 Q. The trust's behavior increases or decreases
5 the number of claims in your view?

6 A. Based on my reading of all of the materials
7 that are referenced, the trust's behavior increased the
8 number of claims that were brought.

9 Q. One last question.

10 You were, in your earlier testimony you were
11 asked this question:

12 Professor, do you understand your opinion in
13 this case to go to the question about whether or not I
14 believe as you put it the trust is entitled to recover
15 from the tobacco industry?

16 Answer: I think both my reports go to the
17 ultimate issue, which resolves around who got paid, how
18 much they got paid and why they got paid.

19 And then there is more that follows.

20 But I wanted to ask you, what you meant there
21 when you used the two words "ultimate issue."

22 A. What I meant is that my two reports are
23 relevant to, are inform -- inform how one resolves the
24 issues in this case. In other words, I hope what I

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1 have done helps people to ultimately resolve the issues
2 here.

3 MR. MUNSON: No further questions. Thank
4 you, Professor.

5 THE WITNESS: Thank you.

6 BY MR. FINK:

7 Q. Professor Gross, you have had various
8 breaks during the testimony that you have given in your
9 deposition today and on Wednesday; is that right?

10 A. Yes, we have.

11 Q. Have you during any of those breaks or in the
12 interim between the first session of your deposition

13 and this session had an opportunity to discuss with
14 your counsel any of the questions that were just asked
15 to you?

16 A. Um, the lawyers indicated that they wanted to
17 ask me certain questions to clarify or elaborate on,
18 elaborate on or illuminate certain issues, so I knew I
19 was going to be asked questions.

20 Q. All right. I guess my question is whether
21 you discussed with them the subjects of any of the
22 questions that Mr. Munson just asked you?

23 A. I think I knew the general subject areas in
24 which he told me he was going to ask questions.

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1 I formed my own answers as I always have and
2 I am very clear about that. I answer in ways that
3 I believe based on what I have done and that I am
4 comfortable with. And that's how I have operated to
5 date.

6 Q. What were the subjects that Mr. Munson
7 identified for you as ones that he was going to cover?

8 A. Um, basically, the ones that he covered now.
9 My experience in, I would say my experience.

10 Um, and he indicated that -- I don't recall
11 any other specific areas in which he said that he
12 wanted to mention something.

13 Q. Professor Gross, are you aware of any
14 scholars who you would identify as experts in issues
15 unique to mass tort bankruptcies?

16 A. I am sorry. Can I --

17 Q. Would you read that back.

18 (Record read.)

19 A. I don't know anyone who has just written
20 about mass torts. There have been some people who have
21 written more about mass torts than other topics.

22 So, in that sense I am familiar with certain
23 academics who have written more about mass torts than
24 perhaps they have written about other things, if one;

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1 but bankruptcy professors tend to write about a variety
2 of topics and bankruptcy professors teach a wide range
3 of issues, which include mass torts, but certainly
4 aren't limited to them.

5 So, I guess my answer to your question,
6 that's my answer to your question.

7 Q. Can you identify for me any scholars who you
8 would identify as experts in mass tort bankruptcy?

9 A. I would say there are a cadre of us who write
10 about mass torts and bankruptcy and different phases of
11 it and different aspects of it and different pieces of
12 it. I don't know that I could name one person whom
13 I would consider sort of the bankruptcy mass tort
14 person. Different of us speak to different parts of
15 it, so I don't think I could name you one bankruptcy
16 law professor that would be uniquely defined by his or
17 her writings in that area.

18 Q. Professor, please listen carefully to my
19 questions. I am not asking you to identify the mass
20 tort expert, I am asking you if you can give me some
21 examples of scholars who you would identify as experts
22 in mass tort bankruptcy?

23 A. Um, we are getting to this issue of you know

24 is a bankruptcy scholar someone who is --

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1 Let me answer it again.

2 There are lots of people who have expertise
3 in mass torts and bankruptcy, and if you looked at
4 their writings they have written things that involved
5 mass torts and bankruptcy.

6 I am not sure whether they would define
7 themselves or I would define them as experts in mass
8 torts and bankruptcy. I can certainly tell you people
9 who have in addition to myself who have written on mass
10 torts and bankruptcy. But --

11 Q. Are there individuals who you consider more
12 expert than yourself in mass tort bankruptcy?

13 A. I think there might be people who, whose
14 writing one could say is more directed at mass torts,
15 and depending on ones different definition of mass
16 tort, expert might fit that.

17 There was a period of time where lots of
18 people were writing, it surrounded a certain time
19 period, the meaning of future claims, the meaning of
20 the word claim, those kinds of issues, and there were
21 people who wrote very focused articles on that.

22 So, depending on how you define mass tort
23 expert, I would tell you that of the books that have
24 been written about how to think about bankruptcy, about

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1 how the system works, how to treat voluntary versus
2 involuntary creditors, how to think about how
3 committees and Chapter 11 functions, how to think about
4 the policies behind the bankruptcy law, I would say
5 that my book stands on a shelf with very few others in
6 doing that.

7 Q. So, is it fair to say, Professor, that you
8 are a leading expert in mass tort bankruptcy?

9 A. Um, I leave it for others to categorize who I
10 am, and how they care to label me.

11 I can tell you how I consider myself, I
12 consider and how I would define myself.

13 I would tell you that I am a person who
14 has expertise in bankruptcy including Chapter 11,
15 including mass tort cases, and that I am recognized as
16 a preeminent scholar in my field as evidenced by my
17 writings, my speaking engagements, my public
18 recognition and the awards that I have gotten in the
19 context of my profession. That's how I define myself.

20 Q. Professor, in your advanced bankruptcy course
21 do you use a case book?

22 A. Um, no. I have in neither my Chapter 11
23 course nor in my advanced policy courses, advanced
24 bankruptcy policy I have not, I have used books, I have

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1 not used what one would define as a, in those courses a
2 traditional case book.

3 Q. Which is the course in which you used the
4 book Strategic Bankruptcy?

5 A. Um, I use that course in both a Chapter 11
6 course and I have used it in my bankruptcy policy
7 courses, which have taken a variety of forms,
8 bankruptcy policy as a freestanding course, is a

9 freestanding course.
10 I have also taught it as a course coupled
11 with an externship. In that context, I have used that
12 book among I might add others. It is not the only
13 material but, I have used it in that --

14 Q. What I was about to ask you in your Chapter
15 11 course, how many books do you use in teaching that
16 course?

17 A. Well, at the time I taught the Chapter 11
18 course I may have used two books in addition to a
19 variety of, and not counting the bankruptcy code itself
20 or the bankruptcy rules, which count as books, I
21 probably used two published books, if my memory serves,
22 that would be about right, plus a variety of duplicated
23 material which are handed out to students, sometimes in
24 what looks -- as thick as books -- but as supplements.

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1 Q. Did I understand you correctly that
2 approximately one-third of this book Strategic
3 Bankruptcy addresses the Johns-Manville bankruptcy?

4 A. Yes. That is correct.

5 Q. What percentage of class time in your Chapter
6 11 course would you say that you dedicated to the
7 discussion of the Johns-Manville bankruptcy?

8 A. If you take the courses that, in which I
9 discuss it, it has varied from semester to semester in
10 terms of what are particularly hot or relevant issues
11 at any given point in time.

12 As I indicated earlier, Chapter 11 is, mass
13 torts is just one piece of Chapter 11. But, the
14 Johns-Manville case usually would come up or mass tort
15 cases in several contexts, eligibility to file, the
16 nature of the automatic stay and relief from the stay
17 and third party releases and the effects of third
18 parties, as well as in the context of confirmation and
19 beyond, and the strategic uses of bankruptcy, as the
20 title of the book suggests. If I were giving you a
21 percentage of what part of the course, 15 or 20
22 percent.

23 Q. How much of that 15 or 20 percent was spent
24 discussing the trust?

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1 A. The specific trust is that what you are
2 asking?

3 Q. Yes.

4 A. The Johns-Manville trust or trust as a
5 concept?

6 Q. The Johns-Manville trust.

7 A. Um, I would not say, um, a great deal of
8 time was spent discussing the specifics of the
9 Johns-Manville trust.

10 One of the things that you do when you teach
11 is that the approach to material the way one addresses
12 the issues are such that any given topic you could
13 teach a whole course on, and you figure out really how
14 you can give over the span of a semester students a
15 very fair understanding, recognizing that you can't
16 cover every issue.

17 What I will tell you though is that as an
18 academic my job in preparing for class is always to
19 think very broadly and to consider and read lots of

20 material, even if all of that doesn't ultimately get,
21 it adorns what I teach, but students don't always hear,
22 read, see everything that I have thought about
23 beforehand. So, that's my answer.

24 Q. I have just asked you a series of questions

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1 about your Chapter 11 course. If I asked you the same
2 questions about your bankruptcy policy course, would
3 the answers be roughly the same?

4 A. I have been talking about both of them
5 collectively.

6 Q. Fair enough.

7 A. I am sorry. I hadn't realized that you had
8 made --

9 Q. That's fine. I want an answer as to both,
10 and if you have already given it to me, the record is
11 now clear.

12 A. I have been talking about my advanced
13 bankruptcy courses, whether they have taken the course
14 of Chapter 11 or an advanced bankruptcy policy -- I
15 would say that the answers, the percentages may be
16 slightly different, but on balance I would say that is
17 a fair assessment.

18 Q. Thank you for that clarification.

19 At these programs with the Southern Florida
20 Bankruptcy Bar Association and the Eastern District of
21 Pennsylvania bankruptcy conference, did you select the
22 problems to be discussed?

23 A. Um, actually at some of them I was asked if
24 I could come up with topics that I thought should be

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1 discussed or to review problems that people had
2 developed. For the most part though the problems were
3 picked by the people organizing the conference because
4 they thought that they were relevant or important or
5 useful to practitioners.

6 Q. Did you ever bring to one of these programs
7 a problem about mass torts, or were those all problems
8 that were picked by the people involved in the
9 conferences?

10 A. Well, I knew they would be picking mass torts
11 because in Florida it was a particularly hot issue, so,
12 while as I indicated to you I suggested topics, I knew
13 in Florida I did not have to do that, that was one they
14 would come up with on their own.

15 Q. Right. My question is, did you ever suggest
16 a mass tort issue as a topic for one of these things?

17 A. I don't recollect --

18 I may have commented on a mass tort problem,
19 I may have suggested some nuance or some suggestion or
20 some case to add to the problem; I don't recollect.

21 Q. You said as I understand it that you
22 eventually peer, that you essentially peer reviewed an
23 article on mass torts by somebody named Kathryn Heidt;
24 is that right?

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1 A. Yes, I -- peer reviewed is a more formal term
2 suggesting that I was looking at it to accept it or
3 reject it as a, for a journal. I was sent a draft and
4 I read it and made some suggestions.

5 Q. What was the topic of that article?
6 A. It is an article on how to deal with mass
7 torts in bankruptcy and how to think about mass torts
8 and bankruptcy.
9 Q. How many people reviewed that article; do you
10 know?
11 A. Um, I can only tell you who she acknowledges
12 in the entry note to that article. I think it is me
13 and one other academic, but she could well have shown
14 it to others. It is, she just acknowledges two of us.
15 Q. Do you review articles written by other
16 scholars before they are published, on a regular basis?
17 A. Um, yes. I do. I read lots of articles,
18 drafts of articles for people and when asked to comment
19 or critique, whatever I am asked to do.
20 Q. Have you been asked to review drafts by, any
21 other articles on mass torts?
22 A. None that I remember off the top of my head.
23 But I have to say that I read lots of
24 articles for people, in a variety of contexts, short
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1 articles, long articles, and I wouldn't know one way or
2 the other whether others of them have specifically
3 dealt with mass torts.
4 Q. Is it your view that there is any specific
5 bankruptcy code provision that was violated by the
6 trust's payment of 100 percent to some claimants and
7 less than 100 percent to some other claimants?
8 A. Just repeat it again, since we are --
9 Q. Sure. Can you read that back.
10 (Record read.)
11 A. I would say that the trust's behavior
12 brings into question several bankruptcy code
13 provisions. As I have indicated before there were
14 questions about whether or not consummation even should
15 have happened, and the fact that certain things were
16 not disclosed prior to consummation raises as I think I
17 answered previously certain issues about the need and
18 requirement for disclosure in bankruptcy and the need
19 and requirement to file accurate documents with the
20 court.
21 And there are specific bankruptcy code
22 provisions saying that you have to treat all like
23 creditors equally, and those are implicated by the
24 disparate treatment that you just described. And the
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1 other piece that is very useful to remember here also
2 is that the code defines who can get paid and only
3 allowed claimants should be paid.
4 And to the extent that people who weren't
5 allowed claimants, which means by the way, just so I am
6 clear about this, the trust was only supposed to pay
7 people who had claims based on asbestos, and so if they
8 did not pay those, if they somehow did not pay allowed
9 claims then another aspect of the bankruptcy code is
10 implicated.
11 So, I would say the answer to your
12 question is yes, specific bankruptcy code sections are
13 implicated by paying one group of people 100 percent
14 and the other group of people only 10 percent.
15 Q. Professor, my question is not whether

16 bankruptcy code provisions are implicated.
17 My question to you is, can you identify for
18 me any specific, and numbers would be great, bankruptcy
19 code provisions that in your view were violated by the
20 trust's payment of 100 percent to some claimants and
21 less than 100 percent to other claimants?

22 MR. MUNSON: Objection. Asked and answered.

23 A. I am going to stand on the answer that I gave
24 you. I think I explained -- explained what I thought

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1 happened.

2 Q. Okay. Professor --

3 What's the basis for --

4 A. May I just finish?

5 MR. MUNSON: Go ahead.

6 Q. No, I think you said that she had. There is
7 not a question pending at this point.

8 A. Right. I just wanted to know that I thought
9 I had answered your question.

10 Q. I did not, but that is okay.

11 Professor, what's the basis for the statement
12 that you made in your answer, I think it was two
13 answers previous -- actually --

14 Strike that.

15 Professor, Mr. Munson asked you some
16 questions about whether in your view the trust's
17 conduct led to an increase in the number of claims
18 against the trust; do you recall that?

19 A. Yes.

20 Q. Professor, do you claim to have any expertise
21 in the area of propensity to claim?

22 A. In the area of?

23 Q. Propensity to claim.

24 A. Well, I have dealt with a lot of cases with

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1 very complex claims in bankruptcy, and I served as a
2 court appointed expert -- not a court appointed expert,
3 excuse me -- a court appointed official representative
4 to speak for numerous parties who had interests that
5 weren't otherwise represented.

6 And I have been involved in cases in which
7 huge numbers of claims have been at issue. And as a
8 bankruptcy person I have thought long and hard about
9 claims. I am not sure I would define myself as
10 somebody who had, was an expert on propensity in
11 claims. I am not sure what that expert would be.

12 I can tell you that I have had expertise as
13 to that experience as to that issue in the bankruptcy
14 context. I am not sure I -- I don't know what the
15 person would be, but I would not, I don't know what
16 that person would be. But that is my experience in
17 respect to claims.

18 Q. Do you have any empirical basis for your
19 claim that more people have claimed against the trust
20 as a result of the trust's conduct?

21 A. What I can tell you is that I saw documents
22 relating to how the trust was operating and concerns
23 about what it was doing, and concerns as to what was
24 happening with the level of claims.

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1 And I am also familiar with documents
2 relating to claims growth, and when it grew and how it
3 grew. And from that information I was able to garner
4 the insights that I have given you.

5 Whether or not that in your judgment
6 qualifies as empirical, I don't know, it is based on
7 the material that I have, the -- relied on that is set
8 forth in these documents.

9 And I am sure one could find someone who
10 is expert at quantifying what I am describing and my
11 interpretation of the facts there, there no doubt could
12 be someone who could do that.

13 Q. Professor, there is a chapter in your book
14 Failure and Forgiveness called Impericalism in
15 Bankruptcy; isn't there?

16 A. Can I get my book?

17 Q. If you need to, sure.

18 A. Yes there is a chapter entitled Impericalism
19 in Bankruptcy.

20 Q. You know what empericalism is; do you not?

21 A. Um, there are different kinds of
22 empericalism, but yes I have a sense, absolutely, as to
23 what empericalism means.

24 Q. Okay. Professor, have you made any effort to

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1 quantify the extent to which if at all the trust's
2 conduct has led to an increased number of claims
3 against the trust?

4 A. I have examined and interpreted and thought
5 about the materials to indicate that it happened.

6 I have not quantified the specific amount of
7 claims that were so affected. I have not done that
8 quantitative analysis. And indeed the person who would
9 do that would have expertise in quantification, which
10 is not something that I was asked to do nor is it
11 something within the qualifications that I have.

12 Q. So, do you know as a fact whether or not more
13 people actually claimed against the trust as a result
14 of its conduct?

15 A. I know what the trust people said themselves,
16 and I know they made observations about claims going up
17 and I know that to the extent one can see cause and
18 effect, there were certain facts that were written
19 about and then there were certain things that happened
20 in light of those facts.

21 And based on my interpretation and assessment
22 I could give my view as to what I thought that meant.

23 And what I thought that meant was that claims
24 were going up for the reasons that I described to you.

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1 Q. And your sole basis for that is your review
2 of trust related documents; is that right?

3 A. It is the documents, many of the documents
4 that are in the two lists that I have here, the vast
5 majority of them would be trust related documents.

6 There may have been some aspects of this that
7 were addressed in various other documents other than
8 that I looked at, whether that be articles or court
9 opinions or other things that I looked at, depositions
10 that I read.

11 So, I would say it is based on the material

12 that I assessed and thought about.
13 Q. Professor, does your book Failure and
14 Forgiveness have a can chapter called Conclusion and
15 Recommendations?
16 A. Yes. It does.
17 Q. There is no reference in that chapter to mass
18 torts is there?
19 A. Um, as you know, the book has a number of
20 recommendations and I would --
21 Q. If you need to read them, feel free.
22 A. I would want to look them over to --
23 Q. That's my last question. If you want to take
24 a break while you do that, that is fine.

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1 A. Um --
2 MR. MUNSON: Objection to the question.
3 What's in the book stands for itself.
4 MR. FINK: I would like an answer.
5 A. The answer to your question is, yes,
6 there are some specific conclusions and recommendations
7 that are directed at tort claimants and involuntary
8 creditors.
9 Q. My question was about mass torts. Would you
10 please go ahead and point them out to me.
11 A. Well, I think, I mean short of going over
12 the whole conclusion with you, as I indicated when I
13 referred to the book before, involuntary creditors
14 would encompass mass tort claimants as would some tort
15 claimants. So, there are aspects of the conclusions
16 that no doubt would have an impact on mass tort cases.
17 Q. That's not my question.
18 I would like you to go through the
19 conclusions and recommendations chapter and point out
20 to me where there are references to mass torts or mass
21 tort cases, and I would like you to read through it and
22 point out the instances to me.
23 If you want to take a break while you look
24 through it, that's fine with me, and if not, I will be

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1 happy to sit here.
2 MR. MUNSON: Objection. Asked and answered.
3 A. My book speaks for itself.
4 Q. Professor, am I correct in understanding that
5 you are unable to point out to me any specific areas in
6 the chapter on conclusion and recommendations in your
7 book addressing mass torts?
8 A. No. I am --
9 Q. If not, then I would like you to please
10 do so.
11 A. I am not unable to do it. I think what I
12 have indicated is that the chapter, the conclusion and
13 the recommendations which summarize the whole book
14 which includes numerous references to mass tort would
15 also deal with those issues, and what I have written
16 speaks for itself.
17 Q. So, it is your testimony that this chapter
18 summarizes the book? You just said that, didn't you?
19 A. The last chapter of the book is entitled
20 conclusions and recommendations, and I think its title
21 speaks for what it does.
22 Q. Fair enough. I would like an answer.

23 Can you point me to any specific language in
24 that chapter that makes reference to mass torts or
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1 discusses mass tort cases?

2 I am asking you to go through and
3 specifically do it. You do have a copy of the book
4 in front of you; do you not?

5 A. Yes, I do have a book.

6 Q. Okay. Would you please flip through the
7 chapter and point out the references to me.

8 MR. MUNSON: Counsel, I object to the
9 question. You have asked it a couple times and
10 you can do this as easily as she can. What's
11 there speaks for itself.

12 MR. FINK: Counsel, I don't see it.

13 If you want to stipulate to the fact that it
14 is not there, then that is fine.

15 I am asking the author of a book to point out
16 specific references to me; I think I am entitled
17 to a responsive answer.

18 I am happy to sit here, I am happy to take a
19 break, I want an answer to my question, unless you
20 want to stipulate to the fact that they are not
21 there.

22 MR. MUNSON: I will stipulate to the fact
23 that the words that are in this chapter are the
24 words that are in this chapter, and what's there

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1 is there, and what's not is not.

2 The witness has answered your question and
3 testified to her view of what's there.

4 It seems to me to be an utter waste of time
5 to sit here and read something that anybody can
6 read.

7 MR. FINK: I would suggest it is a greater
8 waste of time for us to sit here and debate it.

9 Q. Professor, would you please point to me the
10 chapter --

11 Would you please point to me, to the language
12 in the chapter on conclusions and recommendations that
13 makes specific reference to mass torts or to any mass
14 tort cases?

15 MR. MUNSON: How long is the chapter?

16 A. 244 to 250.

17 Q. Six pages.

18 MR. MUNSON: Well, why don't we take a short
19 break and read the six pages and answer the
20 question so that we can end the deposition.

21 THE WITNESS: Okay.

22 MR. FINK: Fair enough.

23 THE VIDEOGRAPHER: We are now going off the
24 record and the time is 2:14 p.m.

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1 (Recess.)

2 THE VIDEOGRAPHER: Stand by, please.

3 We are now going on the record, the time is
4 2:24 p.m.

5 Q. Professor, before we took that recess we were
6 talking about the conclusions and recommendations
7 chapter of your book. Have you had an opportunity to

8 review that?

9 A. Yes, I have.

10 Q. Okay. Can you now please point out to me the
11 sections of that chapter that address mass torts or
12 mass tort cases?

13 A. I am happy to. Apart from the general
14 provisions and the conclusion about how to think about
15 bankruptcy, how to think about cases, let me get to
16 specifics of which there are eight.

17 On page 246 of the book I referenced the need
18 to use shared professionals or panels of experts as a
19 way of curbing costs and saving time.

20 And earlier in the text I talked about why
21 Chapter 11 cases can be very expensive, including in
22 the context of issues involving future claimants.

23 So, that is the first example among several
24 for that suggestion.

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1 The next bullet point relates to the
2 recommendation that limited liability should be
3 curtailed, and select limitations on discharge made
4 applicable to corporate debtors to eliminate certain
5 disparate treatment. And in that context in the book I
6 talk generally about if corporate officers or directors
7 did something bad knowingly, the law should perhaps
8 consider being changed so that those individuals could
9 be held responsible.

10 In the same way individual debtors are held
11 responsible if they do something wrong.

12 And that is an issue that could come up in
13 the context of mass tort cases should the officers or
14 directors of a company that produced a product that was
15 defective have some personal knowledge or information
16 that led to them to behave badly.

17 The next recommendation is on page 247,
18 that relates to the fact that although equality of
19 treatment would remain the norm, certain creditors,
20 self selecting creditors could rebut the presumption of
21 pro rata distribution. And one of the groups that
22 could do that would be tort claimants.

23 So, to the extent that my recommendations
24 would involve a different way of treating creditors,

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1 certain creditors like certain of the mass tort
2 creditors individually could come forward and ask to
3 be treated better because of what's happened in their
4 particular situation.

5 The next recommendations which deals,
6 recommendation which deals with creditors committees
7 and their selection and the need for a more diverse
8 constituency speaks to an issue that I testified to,
9 and that is also in this book about my concerns about
10 how creditors committees are put together to ensure
11 that those committees truly speak for the parties that
12 they represent. And that is an issue that also arises
13 in a mass tort case.

14 The next recommendation deals with tort
15 claimants and other involuntary creditors, other than
16 the government, being able to rebut in my suggestion
17 the presumption of pro rata distribution upon a showing
18 of substantive unconscionability, and that is yet

19 another example of what would happen in a mass tort
20 case specifically referencing tort claimants.

21 On the next page 248, I have a recommendation
22 regarding the definition of claims and specifically say
23 that it should be expanded to include future claimants,
24 because as I have indicated in the book, that is an

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1 area where there hasn't been definitive word yet and
2 the code is not clear on that subject.

3 And lastly there are two bullet points
4 related to recommendations involving the interests of
5 community, where I suggest that bankruptcy has and
6 Chapter 11, have ripple effects and can affect other
7 communities, which is certainly possible in the mass
8 tort context.

9 And it is my recommendation that the court
10 take those ripple effects into account.

11 So, of the recommendations I have, these
12 eight are ones that have particular applicability to,
13 among other groups, mass tort Chapter 11 cases.

14 Q. Thank you, Professor.

15 MR. FINK: I have nothing further for you at
16 this time.

17 MR. MUNSON: Thank you, Professor Gross.

18 THE WITNESS: My pleasure.

19 (Continued on next page)

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1 THE VIDEOGRAPHER: We are now going off the
2 record.

3 The time is 2:29 p.m.

4 This is the end of the tape labeled number
5 6 and this concludes the video deposition of
6 Professor Karen Gross.

7 (Time noted: 2:29 p.m.)

8

9

10 -----
11 KAREN GROSS, ESQ.

12

13

14 Subscribed and sworn to before me

15 this day of 2000.

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C E R T I F I C A T E
STATE OF NEW YORK)

4) ss.
5 COUNTY OF NEW YORK)
6

7 I, ROBERT X. SHAW, CSR, a Notary
8 Public within and for the State of New York,
9 do hereby certify:

10 That PROF. KAREN GROSS, ESQ., the witness
11 whose deposition is hereinbefore set forth,
12 was duly sworn by me and that such
13 deposition is a true record of the testimony
14 given by such witness.

15 I further certify that I am not
16 related to any of the parties to this action
17 by blood or marriage; and that I am in no
18 way interested in the outcome of this
19 matter.

20 IN WITNESS WHEREOF, I have hereunto
21 set my hand this 9th day of June, 2000.
22
23

24 _____
ROBERT X. SHAW, CSR

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3 WITNESS EXAMINATION BY PAGE
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15 GROSS FOR ID.
16 Gross Exhibit 5, June 8, 2000 letter from Ezra
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